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1903. *July* 26. The Right Honourable Sir John Rigby, *formerly one of the Lords Justices of the Court of Appeal, died at his residence, Carlyle House, Chelsea Embankment, at the age of* 69.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

MASON . . . . . APPELLANT; H. L. (E.)

AND 1902

OGDEN AND OTHERS . . . . . RESPONDENTS. *Nov.* 11.

Will—Residuary Devise—Specific Devise—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 25.

A devise which does not include all the testator's real estate may be a good "residuary devise" within the meaning of the Wills Act, 1837, s. 25.

The decision of the Court of Appeal, [1901] 1 Ch. 619, affirmed.

A TESTATOR by his will in 1862 devised a freehold house at Wimbledon to his son in fee, and "as to all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere and all my leasehold estates whatsoever and wheresoever" he devised the same upon certain trusts. At his death in 1865 the testator possessed freeholds at Wimbledon and elsewhere, and no copyholds. The devise of the house to the

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son failed because the son had attested the will. The question having been raised whether the house devised to the son passed under the devise of "all other" the testator's freeholds, or whether it was undisposed of, Kekewich J. held, on the authority of *Springett* v. *Jenings* (1) and *In re Brown's Trusts* (2), that that devise was not a residuary devise within the Wills Act, 1837, s. 25, because it was not "universal" and did not include copyholds. (3)

The Court of Appeal (Rigby, Vaughan Williams, and Stirling L.JJ.) reversed this decision, and held that it was a good "residuary devise" under that section, and included the house the devise of which to the son had failed. (4)

Warrington, K.C., and *George Henderson*, for the appellants. *Renshaw, K.C.*, and *C. H. Sargant*, for the respondents.

The arguments are fully reported in the Courts below. Upon counsel for the respondents urging that a reversal of the decision below would upset the practice of conveyancing, the Earl of Halsbury L.C. observed that if necessary he should have no hesitation in upsetting that practice. As the reader will see, it was not necessary.

EARL OF HALSBURY L.C. My Lords, it has been truly observed that this is a very short point, and I confess I have not been able from the first to entertain much doubt about it. I think the judgment of the Court of Appeal is right and ought to be affirmed.

I am quite content to say that all the three learned judges of the Court of Appeal appear to me to have proceeded on the same line of thought, in which I concur. I should be very sorry indeed to place upon this remedial statute (which is intended to do the very thing which it is suggested this language does not do—that is, to enable the testator to sweep up everything not properly disposed of before) such an artificial meaning as to take away from the persons intended to be

(1) (1871) L. R. 6 Ch. 333.
(2) (1855) 1 K. & J. 522.
(3) [1900] 2 Ch. 196.
(4) [1901] 1 Ch. 619.

benefited that which they were meant to have. To my mind there is no doubt in the world that what the testator meant to do was that which I think he has done. He has made a perfectly good residuary devise within the meaning of the 25th section; and therefore I think the judgment is right. I do not want to add anything to what the learned judges in the Court of Appeal have said, because I think they have gone over the whole ground and disposed of the entire question. It appears to me that the argument on the other side rests on a somewhat narrow and artificial construction of the words, looking at what was meant to be done by that section.

Therefore I move your Lordships that the judgment appealed from be affirmed, and that the appeal be dismissed with costs.

LORD SHAND. My Lords, I entertain the same opinion. I cannot profess to have had any acquaintance with the statute of 1837 prior to the discussion which has taken place to-day, or with what seems to me the peculiar and special state of the law as it existed before that statute; but it appears to me that the reasoning of the learned judges who have dealt with this matter on appeal commends itself to one's good sense.

I confess, so far as I am concerned, I am very strongly moved by the fact that the testator had no copyholds, and I cannot see what good was to be got by putting in the residuary clause "copyholds" when he had none to dispose of. That seems to me to be the whole point in this case. Assuming that universality is required in order to make effectual a proper provision of residue, that requirement is fulfilled where the terms used plainly embrace and describe the whole estate of which the testator died possessed. I can see that the terms of the judgment of Mellish L.J. in *Springett* v. *Jenings* (1) if strictly followed would warrant Kekewich J.'s judgment in this case; but I agree with Rigby L.J. and the other learned judges in the Appellate Court that the observations of Mellish L.J. are to be read with reference to the particular instrument before him and do not apply to a case like this,

(1) L. R. 6 Ch. 333.

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where the testator had by the terms of his will disposed of the whole estate of which he was possessed.

As stated by Mr. Renshaw, the word "other" does not seem to make the difficulty which I should have supposed it did but for the authorities. According to these authorities the word "other" in this disposition does not affect or limit the force of the residuary clause, which would sweep in the property which the testator did intend specially to convey, but which turned out to be ineffectually conveyed because of the circumstance that the beneficiary was unfortunately made a witness to the execution of the deed.

I have no hesitation, therefore, in agreeing with your Lordships in holding that the judgment should be affirmed with costs.

LORD DAVEY. My Lords, I confess I should not have been sorry if your Lordships had seen your way to affirm the decision of Kekewich J., because it had the effect of giving to Thomas Frederick Mason in his quality as heir-at-law the property which he had lost—that is to say, the property which had been devised to him, and which he would have taken as devisee but for the unhappy accident of his having witnessed his father's will. But I think, on a consideration of the words of the 25th section, your Lordships should affirm the decision of the Court of Appeal.

My Lords, the question really is reduced to a very small one, although it is of importance to the parties. The testator gives certain freehold property at Wimbledon to his son—a devise which fails; and then he says, "And as to all other my freehold messuages or tenements at Wimbledon aforesaid and elsewhere and all my leasehold estates whatsoever and wheresoever," I give them upon other trusts. Now, the real question is whether that gift of "all other" the testator's freehold messuages and so forth is a residuary gift. One asks oneself, Why not? The gift is precisely the same (that is not disputed) as if he had said, "And as to the residue of my freehold messuages and tenements at Wimbledon and elsewhere." In form it certainly is a residuary gift. Why is it not to be treated

as a residuary gift under the 25th section? Well, my Lords, the only legal reason I have heard is that it does not possess the attribute of "universality," whatever may be meant by that; and the judgment of Mellish L.J. in *Springett* v. *Jenings* (1) is referred to in support of that proposition. My Lords, all that I understand that very learned judge to have meant by his expression, which perhaps was not chosen with the felicity which usually distinguishes his judgments, was that a clause which is relied on as a residuary clause must be so framed as to sweep in by its terms the whole of the property to which it applies. I can attach no other meaning to the word "universality." When you are speaking of a residuary gift of personal estate, the clause must be so framed as to be capable of carrying every description of personal estate not otherwise disposed of by the will; and when you are speaking of a residuary gift of real estate generally, it must be so framed as to carry in every atom of real estate; but why we may not have a residuary gift of freehold estate I am at a loss to understand. It is not necessary that a residuary gift shall comprise every kind of property which the man has: for example, you may have a residuary gift of personal estate. The words in the Wills Act are—"shall be included in the residuary devise (if any) contained in such will." Why is it necessary to construe that as meaning a residuary devise of real estate? A residuary devise of real estate has no more the attribute of "universality" than a residuary gift of personal estate or a residuary devise of freeholds. On the other hand, a devise of freeholds has this attribute of "universality" if it is framed in such words as to be capable of sweeping in every description of freehold estate which is not otherwise disposed of.

My Lords, I think it is not necessary for the construction of the 25th section of the Wills Act to say that the residuary devise there spoken of must be a residuary devise of the whole of the real estate, and the construction which has been put upon the section by the Court of Appeal, and which your Lordships have favoured, seems to me to meet the particular mischief and the particular defect in the previous law which

(1) L. R. 6 Ch. 333.

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the section was framed to remedy. Therefore I agree with the judgment proposed by my noble and learned friend on the Woolsack.

LORD ROBERTSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 11, 1902.

Solicitors: *H. J. Mannings; H. S. Bridge.*

[HOUSE OF LORDS.]

H. L. (E.) 1902 *Nov.* 13.

NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY . . . . . } APPELLANTS;

AND

THURSTAN . . . . . RESPONDENT.

Building Society—Infant Member—Mortgage by Infant Member invalid—Lien of Building Society—Building Societies Act, 1874 (*c.* 42), *s.* 38—*Infants Relief Act*, 1874 (*c.* 62), *s.* 1.

Although an infant may be a member of a building society registered under the Building Societies Act, 1874, and may by s. 38 "give all necessary acquittances," he cannot execute a valid mortgage to secure advances made to him by the society. Such a mortgage is by the Infants Relief Act, 1874, s. 1, absolutely void as against the infant.

The decision of the Court of Appeal, [1902] 1 Ch. 1, affirmed.

IN June, 1898, the respondent, then a minor, was admitted a member of the appellant society, which was registered under the Building Societies Act, 1874. She then borrowed money from the society to enable her to buy land and complete houses which were being built on it. This was carried out by two deeds, one of July 21, by which the land was conveyed to the respondent in fee in consideration of money expressed to be paid by her to the vendor; the other of July 22, by

which the respondent mortgaged the property to the society (in the usual form) as a security for advances to be made to her. The society having afterwards discovered that the respondent was a minor discontinued the advances they had been making, took possession of the property, and spent money on it. The respondent having reached twenty-one and brought an action against the society claiming a declaration that the mortgage was void, delivery of the title-deeds and possession of the property, Joyce J. dismissed the action, holding that the purchase and the mortgage formed one transaction, and that the respondent could not repudiate one part while affirming another. (1)

The Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) held as a matter of fact that the purchase and the mortgage were two distinct transactions, and varied the judgment of Joyce J. by an order declaring (inter alia) that the society was entitled to a lien upon the houses for the amount of the purchase-money and expenses paid by the society on the completion of the purchase of the property, with interest at 4 per cent.; and the respondent undertaking to procure a transfer of the lien and to pay the society off the said amount, and consenting to the deeds being deposited in Court, and undertaking not to deal with the legal estate pending the appeal to this House, the society was to be at liberty to deposit the title-deeds and mortgage deed in Court, the respondent upon such deposit to be let into possession of the houses. (2)

Hughes, K.C., and *G. Broke Freeman*, for the appellants.

Badcock, K.C., and *Edward Ford*, for the respondent, were not heard.

A full account of the contentions and arguments of the appellants and the respondent is given in the reports below. (3)

(1) [1901] 1 Ch. 88.

(2) [1902] 1 Ch. 1, at p. 14. The order of the Court of Appeal as drawn up did not contain any declaration as to the invalidity of the mortgage deed.

(3) [1901] 1 Ch. 88; [1902] 1 Ch. 1.

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EARL OF HALSBURY L.C. My Lords, in this case I cannot doubt that the judgment of the Court of Appeal was right, and I move your Lordships that the appeal be dismissed with costs. I really do not know that I can add anything to what the learned judges in the Court of Appeal have said. The question seems to me to turn entirely upon the Act of 1874. That Act has in terms made the instrument which is put forward by the society as their security and the foundation of their claim absolutely void. The result of that is that there is no such obligation as has been insisted on at the bar against the respondent.

I notice that Joyce J. apparently would not have disagreed with that proposition, but he gets out of the application of it by using a phrase which to my mind covers up the weakness of the argument. He says that that which the Court below, and which your Lordships here, are disposed to affirm—the right of the society to stand in the shoes of the vendor because they, as agents for the lady, paid the purchase-money—is a transaction which is not set aside and rendered void by the Act of 1874; and that is true. But then, in order to justify the judgment which he gave entirely against the respondent, he says: "But it is all one transaction, and being all one transaction, and this" (what I have now been describing) "being perfectly valid notwithstanding the Act, the whole claim must be rejected."

My Lords, that seems to me to be covering up in language things which are in their nature distinct. It is not true to say it is one transaction. If it were meant that all the parties contemplated the things that were afterwards done, it is perfectly possible that that is true, although I should doubt whether there is much evidence of it; but I will assume it was so—what then? In order to make it one transaction so as to avoid the vice of infringing the Act of 1874, the transaction you are dealing with must be one which avoids that vice. Now, the transaction is a totally different transaction according to the history of the matters as they occurred. There is one transaction, in which on behalf of the respondent the building society buys from a stranger—I mean a stranger in the legal

sense—land which belongs to that stranger. That stranger, at the instance of this society, conveys to this lady that land. Putting your finger upon that part of the transaction, what is there done is an absolutely separate transaction. The parties to it are different, and the nature of the transaction is different—it is a purchase of land. Then in order to build upon that land, in order to make it available for the purpose for which the respondent desires it, money is borrowed from the society, and that money is secured by a mortgage on that which, by the transaction which I have just described, has become the property of the respondent. You cannot help analyzing the transaction for this purpose, and, so far as this part of the money now claimed is concerned, the only thing one can say is that it is money borrowed; it is money borrowed for a particular purpose I agree, but it is money borrowed; and the claim in substance as well as in form is that that money should be repaid. Therefore it is money borrowed by a minor—whether it is secured by a mortgage deed, or whether it is by mere parol, it is money lent by one of the parties to the other, a minor, and now reclaimed from the minor. That is within the express language of the Infants Relief Act; and how it can be suggested that that is the same transaction so as to cure the illegality of that part of it, what I have previously described, I confess I am not able to follow.

Then if one comes to what is the substance of the matter, what can be clearer than that, if the original thing without the mortgage is in itself void, you can neither make it better nor worse by the fact of there being a mortgage, nor can you dismiss the mortgage, which is the only security this society possessed, and say that simply as a member of the society the lady is liable to pay? The answer to that, I think, is in a word: there is no necessity for a member of the society to borrow at all. It is not a necessary part of a member's function as a member of the society to borrow; therefore the two Acts of Parliament—the Act legalising a minor becoming a member, and the Act rendering the transaction of a minor borrowing money and having to repay it absolutely void—are quite

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Earl of Halsbury L.C.

reconcilable. The minor might be a member without having any necessity to borrow.

My Lords, under those circumstances it seems to me that there is no answer to the judgment of the Court of Appeal which affirms the subrogated right of the society to be repaid the money which they, standing in the shoes of the vendor, have a right to claim as a lien upon the property conveyed. On the other hand it is hopeless, as it appears to me, to try to get rid of the express language of the statute, which renders the loan, and the mortgage which was the security for the loan, absolutely and entirely void. For these reasons I think the appeal must be dismissed and the judgment appealed from affirmed.

LORD SHAND. My Lords, I am of the same opinion. I feel that I am scarcely justified in interposing to add anything to what your Lordship has already said; but in a single word I should just like to say that I think in the vendor's lien to which this society succeeded, and to which it had the right to succeed, in respect of the payment they originally made, there was good ground of judgment so far as regards the sum paid for the purchase of the property. But I agree with your Lordship that, while the society will take the benefit of that payment in succeeding to the vendor's lien, they cannot maintain what remains of their case. I agree with the unanimous view of the Court of Appeal that the money which was got and used for the purpose of making improvements on the property, or rather adding buildings on the solum of the property, was really an advance to this lady during her minority, and, consequently, she was not liable for the repayment of it, and the mortgage which she granted for the repayment of that money was ineffectual as an obligation. Those advances are expressly struck at by the provision in the Infants Relief Act, which was passed a few days after the Building Societies Act. That being so, I see no answer, as Romer L.J. has said, to the Infants Relief Act. The language of that Act is too strong for the suggestion that the building society take the benefit of those advances. I do not see any possible answer to that Act.

Therefore, agreeing with your Lordship, and for the reasons clearly stated by each of the learned judges, I am of opinion that this judgment ought to be affirmed.

LORD DAVEY. My Lords, the judgments which have just been delivered by your Lordships who have preceded me, and the judgments delivered in the Court below, appear to me to have entirely exhausted the subject, and I will only add this—that I think Joyce J., if he had not been misled by the impression that the transactions in question in this litigation could all be treated as parts of one transaction, would have been of the same opinion also. The learned judge thought that the transactions of purchase and of mortgage were all parts of one transaction, and that the lady, the minor, could not repudiate the mortgage transaction without repudiating in toto. It has already been pointed out, and it is only necessary to say, that the transaction between the vendor and the purchaser is one thing, and the transaction between the purchaser who has acquired the property and the mortgagees is another thing. The transaction appears to me to be simply this: A person without any means of her own contracts to buy a property; before the purchase is completed she is called upon to pay the purchase-money and she goes to a money-lender, or, as in the present instance, a building society, persons willing to advance the money on some terms, and she obtains a sufficient advance to enable her to complete the purchase. My Lords, that seems a very simple transaction. Then the loan is so framed as to include a further sum of money to enable the purchaser to commence building operations on the land also. The transaction with the vendor was complete when the purchase-money was paid him, and the transaction between the purchaser and the mortgagee was one with which the vendor had no concern whatever.

My Lords, the only question of general importance in this case is the question how far the permission which s. 38 of the Building Societies Act, 1874, gives for an infant to be a member of a building society authorizes the infant to do everything in relation to his or her membership which an adult

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could do. It is argued that the Act, having enabled an infant to become a member, has impliedly enabled and empowered an infant to contract to pay his or her fines, and to enjoy all the privileges of membership, including that of obtaining an advance, and it is said, on the principle, I suppose, that generalia specialibus non derogant, that that is so notwithstanding the absolute and positive declaration in the Infants Relief Act of the same year—that contracts by an infant for the repayment of money borrowed are void. My Lords, I am not of that opinion. It is not necessary, as has been pointed out in the judgments in the Court below, that a member of a building society should obtain an advance. He may be a member of a building society without obtaining an advance; it is entirely in his own option whether he will obtain an advance or not, and that option, as has been pointed out by Romer L.J., can only be exercised on the condition that he is able to comply with the requirements or conditions on which alone an advance is given—one of which is that he shall make an effectual mortgage to the society. Well, my Lords, he may possibly obtain an advance by giving a mortgage by some friend or relative; if he cannot do that it may be his misfortune or it may be his good fortune, but the result is that he cannot exercise that particular privilege of obtaining an advance until he becomes of age, simply because he is unable by law to comply with the conditions upon which alone that advance can be made.

My Lords, I ought only to mention one more point which was made. It is said that the mortgage is not for the repayment of money borrowed, but for the repayment of instalments in respect of the shares. No doubt that in form is so; but when the value of the share, as it is called, has been advanced, those payments on the share assume and bear the character of repayment of money borrowed; and it would be trifling with the plain words of the Infants Relief Act, 1874, if we said that an infant might contract for the repayment of a loan in that form by calling it payments on the share.

My Lords, on the whole I agree so entirely with the judgments which have been delivered, and I am so well satisfied with the reasoning of Romer L.J.'s judgment, with every word

of which I agree, that I do not think I ought to trouble your Lordships at any greater length.

LORD ROBERTSON. My Lords, I entirely agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 13, 1902.

Solicitors: *Peacock & Goddard, for Rothera & Son, Nottingham; Beyfus & Beyfus.*

[HOUSE OF LORDS.]

BEDDINGTON AND ANOTHER . . . . APPELLANTS;

AND

BAUMANN AND ANOTHER . . . . . RESPONDENTS.

Power of Appointment—Special Power—Exercise by Will—Change of Investment—Ademption—Premiums—"Capital Money"—Wills Act, 1837 (*c.* 26), *ss.* 23, 24, 27—*Settled Land Acts*, 1882 (*c.* 38), *s.* 22, *sub-s.* 5, *and* 1884 (*c.* 18), *s.* 4.

A tenant for life of real estate who had under the settlement power to appoint the estate by will among his children after his own death exercised the power and appointed the estate among his children. Afterwards the testator granted under the Settled Land Act, 1882, leases of parts of the appointed property in consideration of premiums paid by the lessees. The premiums were paid to the trustees of the settlement and invested by them:—

Held, that there being in the will no apparent intention to appoint the property representing the premiums, that property did not pass under the appointment.

The decision of the Court of Appeal in *In re Moses, Beddington* v. *Beddington*, [1902] 1 Ch. 100, affirmed.

The decision of Farwell J. in *In re Dowsett*, [1901] 1 Ch. 398, approved.

BY the will of H. Moses made in 1873 freehold estates were devised in trust for his son A. H. Beddington for life, and after his death as Beddington should appoint among his children; in default of appointment upon certain trusts in

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favour of the children. The will authorized the trustees to grant leases and take premiums, the premiums to be invested and treated as part of the corpus or capital of the estates. Moses having died, Beddington by will made in 1892 appointed parts of the estates to two of his children, and died in 1900.

In 1895 and 1898 Beddington, as tenant for life under the Settled Land Act, 1882, granted leases of parts of the freeholds in consideration of premiums which were paid to the trustees of Moses' will, and which they invested in stocks. There was nothing in Beddington's will shewing an intention to appoint the property representing the premiums. Upon a summons Byrne J. held that that property did not pass under the appointment. This decision was affirmed by the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.). (1)

The children of Beddington who were appointees brought the present appeal, which turned upon the construction of Beddington's will. In the opinion of both Courts below and of this House there was nothing in that will shewing an intention that the appointment should carry the investments representing the premiums, and therefore it did not carry them. Such arguments as could be advanced for the appellants by discussing the cases and as were put forward in the Courts below are reported very fully in [1902] 1 Ch. at pp. 106–112. In the opinion of Lord Davey the cases of *Gale* v. *Gale* (2) and *Blake* v. *Blake* (3), upon which the discussion below chiefly turned, have nothing to do with the present appeal.

Haldane, K.C., and *Norton, K.C.* (*J. G. Fawcus* with them), for the appellants.

Levett, K.C., *Upjohn, K.C.*, *Wace*, and *Leverson*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, when the facts which raise this question come to be understood, and the only questions which are subjects for deliberation sufficiently appear, the matter is really reduced to a very narrow compass. I confess,

(1) [1902] 1 Ch. 100. (2) (1856) 21 Beav. 349.
(3) (1880) 15 Ch. D. 481.

for myself I am so very well satisfied with the judgments which have been already delivered by the Court of Appeal that I should be content simply to say that I affirm those judgments and have nothing to add; but for the sake of clearness and to shew what points are in my opinion established as matters of law, I propose to state very shortly what appears to me to follow from the judgments so delivered, in the reasoning of which I entirely concur.

In the first place, my Lords, the question is simply what is the effect and meaning of the will which, under the circumstances of this case, is supposed to be under construction—I say supposed to be under construction, because it is not a fact that there is anything ambiguous in the language of the will itself. The question is whether, in the language of Cozens-Hardy L.J., the general principle is applicable to the determination of this case that, where you are dealing with a will which is an ambulatory document, you have no right to refer to the circumstances under which it was made, or the date in respect of which it was made, or the property that existed at the time when it was made; you are remitted by virtue of the 24th section of the Wills Act to the moment of death to shew what it is that is being disposed of. In passing, I may say that the effort which has been made to fix upon the word "property" some such signification as to evade the proper application of that provision, appears to me to be disposed of by the interpretation which the Wills Act itself in its interpretation clause gives to the word "property." Practically, therefore, it comes to this, whether apart from any special direction or language in the instrument—whether it was a disposition of the man's own property or whether it was an appointment, seems to me to be for this purpose perfectly immaterial—you can find in the instrument that the person who made that testamentary instrument has made a disposition, if it was property, or executed a power of appointment, if it was a power of appointment, in such words and under such circumstances as to shew that he was not devising the particular property alone, but that he was intending that something which should represent that property, if it had

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undergone a change between the two periods—the time of the death and the time of the making of the instrument—should nevertheless pass to the person whom he had made his devisee or appointee. Of course, the broad proposition which Cozens-Hardy L.J. lays down cannot be doubted: when you are dealing with a will you are dealing with an ambulatory instrument, and it operates nothing and can operate nothing till it becomes consummated by the death of the testator—it must wait till then. That is a principle which I think no one has controverted or can controvert—that it must speak from the date of the will, as the 24th section of the Wills Act says, in relation to the property of the testator, whether it is real or personal, or what comes within the 24th section by virtue of the interpretation clause, a power of appointment which may be in him at the time of his death.

Now, my Lords, the facts here are very simple. At the time of the making of the will the property in question did not exist; the property has emerged by the money being raised by way of fine on the making of a lease. But that is not the property dealt with, and the result appears to me to follow necessarily.

I have some little difficulty in understanding the distinction which has been sought to be raised between a special power of appointment and a general power of appointment. I have endeavoured in the course of the argument to see by what set of principles one is to draw any distinction between the two. I confess for myself I have failed to do it. I do not follow it. I entirely concur in the judgment of Farwell J. (1) that there is no distinction, and I have failed, I confess, to follow in what way a distinction is suggested. The result appears to me to be that this case is covered by authority, because I regard the case of *Gale* v. *Gale* (2) as a very important and serious authority under the circumstances. It has now lasted for a very long time with the commentaries made upon it, and notwithstanding the commentary made upon it by Lord St. Leonards. It appears to me that the effect of that case is conclusive. I think we could not decide this case in favour of the

(1) See *In re Dowsett*, [1901] 1 Ch. 398. (2) 21 Beav. 349.

appellants without overruling that case. Under these circumstances it appears to me that this judgment ought to be affirmed.

I only wish to add one word to express my hearty concurrence with what Cozens-Hardy L.J. says in that part of his judgment in which he says, "In each case it is a question of intention to be gathered from the words used and not from speculation as to what the testator would probably have desired. If the language used is such that a devise of his own property would have failed by reason of some subsequent act, an appointment under a special power in the same language must equally fail." It appears to me that those words are conclusive of this case, and I move your Lordships accordingly.

LORD SHAND. My Lords, the judgment of Byrne J. in this case was unanimously affirmed by the Court of Appeal, and again the judgment of their Lordships in that Court is now to be affirmed unanimously by your Lordships. Under these circumstances, I feel that very little need now be said on my part in support of the judgment which is now to be given.

It is not disputed that after the date of the appointment contained in the will of Mr. Beddington, in consideration of premiums of 1500*l.* in one case and 14,500*l.* in the other, the property which was the subject of the appointment was deteriorated or burdened and changed, I might say; there was practically a conversion of the heritable estate, or a large part of it, into money. The money was no doubt invested in another way in the shape of Consols or otherwise, but still the estate was entirely changed in that respect. On the other hand, the appointment in its terms relates to the property only; it does not affect or refer to the money which has been realized from part of the property having been sold; it does not in its terms in any way deal with the proceeds that have been received from that sale. It appears to me, my Lords, that under those circumstances the general principle ought to receive effect that, where a subject which has been given by

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the terms of the appointment is gone in part or in whole, the appointment cannot take effect upon the money which has been received as a substitute. The appointment does not bear to include or to refer to money which might be received if the property should be sold or converted in any way in future; and there is no deed subsequent to the appointment after the change had taken place declaring that the moneys which the trustees had received were to go in the same way as the property appointed. In the absence of anything of this kind, I cannot proceed on a conjectural view as to what may have been intended, but certainly not expressed in the terms used. I do not think the testator can be held to have given an appointment which relates to that money.

I would only say further that, in my opinion, the cases of *Gale* v. *Gale* (1) and *Blake* v. *Blake* (2) have not only been well decided, but that the observations of the learned judges in support of those cases, namely, Lord Romilly in the one and Sir George Jessel on the other, are sound in themselves. I entirely concur in those observations. The language of Sir George Jessel in the case of Blake expresses the view which I hold when he says: "The character of the thing given is changed by the act of the testator, and he has thereby revoked his will by destroying or preventing the continued existence of the subject-matter of the gift. . . . I do not feel myself at liberty to read this will in the manner suggested as meaning that it gives whatever is comprised in the settlement in whatever shape it may exist."

With your Lordship on the Woolsack, I am in the position that I have been unable to follow, as I have desired to do as closely as I could, the distinction which was attempted to be drawn between a general and a special appointment, and I entirely concur in the observations made in *In re Dowsett* (3) by Farwell J. on that matter. On the whole matter, quite concurring with what your Lordship has said, I am of opinion that this appeal fails and that we should adhere to the unanimous judgment of the Court below.

(1) 21 Beav. 349. (2) 15 Ch. D. 481.
(3) [1901] 1 Ch. 398.

LORD DAVEY. My Lords, I agree with your Lordships that this is a case which does not present any extraordinary difficulty, and it is satisfactory to find that the judgment which we are about to pronounce is in accordance with the views which have been expressed by all the learned judges before whom the case has been argued before it reached your Lordships' House.

My Lords, it strikes me that the case is capable of being put upon an extremely simple and short ground, and that is the ground upon which I should prefer to put it. A gentleman, having a power of appointment amongst his children under his father's will of certain estates in the City of London and the neighbourhood, makes his will and makes an appointment of certain of those properties. Afterwards he grants building leases for long terms of years in consideration of the payment of large sums of money by way of fine or premium. By the joint operation of s. 4 of the Settled Land Act of 1884, and s. 22, sub-s. 5, of the Settled Land Act of 1882, those moneys received for fines and premiums became capital moneys within the meaning of the Act, and were held upon the same trusts and to go to the same persons as the lands from which they proceeded would have gone under the settlement, or, in other words, they became subject to the trusts of the settlement. I ask myself, therefore, What was the settlement to which they became subject? And the answer can only be: The settlement made by the will of the original testator, Mr. Moses. In my opinion, it cannot be suggested for one moment that the will of Mr. Beddington, who made the appointment, was part of that settlement. The will was an ambulatory document having no force or effect whatever until the death of the gentleman who made the will, and therefore, in my opinion, it cannot be said with the slightest plausibility that Mr. Beddington's will was part of the settlement upon the trusts of which these moneys were held.

That being so, my Lords, it appears to me that there is an end of the case, because the effect is this—that they became subject to a power of appointment by Mr. Beddington, and in default of appointment by him went in the specified and

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prescribed manner; and the only question which can be possibly raised is this: Is Mr. Beddington's will expressed in such language and in such large terms as to carry not only the property as it then existed, but also this property which has arisen from the particular dealings with it? Now, if I look at the will, I can find no words whatever which point to, or which purport to deal with in any manner whatever, anything else than the property itself. I will take the Westminster Bridge Road property for instance. He might have said, "And also all other capital moneys which shall at any time hereafter, by virtue of dealings with the property or otherwise, be held on the same trusts"; but there is nothing whatever in the will from which you can infer any such intention of any kind. So far as the property itself is concerned, the Westminster Bridge Road property still existed at the date of his death. I do not know whether or not at the date of the will it was under lease or in possession, but it existed at the date of his death in the shape of a freehold reversion upon a long lease, and that is what passed by the appointment made in the will, and in my opinion nothing else.

I will only say, with regard to the cases which have been so much controverted in the Courts below and which have been discussed at the Bar before your Lordships—I mean *Gale* v. *Gale* (1) and *Blake* v. *Blake* (2)—that in my opinion this is not a case of ademption at all, because the property is not adeemed. The property is there, only it exists in a slightly different form from that in which it existed at the date of the testator's death. This is a capital accretion from the property which is held on the same trusts, but is not the property itself. Therefore, in my opinion, those cases have really nothing to do with it; but so much has been said about them that I should like to say this—that I entirely agree in the expression of opinion by Sir George Jessel, if my individual opinion be of any value, that *Gale* v. *Gale* (1) was rightly decided. I think the judgment of Lord Romilly is conclusive. You cannot construe a will which purports to appoint or devise a particular property as appointing or

(1) 21 Beav. 349. (2) 15 Ch. D. 481.

devising property which had no existence at the date when the will was made.

I will only add this further observation—that I also am quite satisfied and agree with every word which was read to us from the judgment recently delivered by Farwell J. in the case of *In re Dowsett.* (1)

I concur in the judgment which has been moved from the Woolsack.

LORD ROBERTSON. My Lords, I agree. The able argument on behalf of the appellants has been answered in advance by the learned Lords Justices on every point, and their judgments seem to me to furnish sound and conclusive grounds of decision.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 14, 1902.

Solicitors: *Montagu, Mileham & Montagu; Upton, Atkey & Co.*

(1) [1901] 1 Ch. 398.

[HOUSE OF LORDS.]

H. L. (Sc.) 1902 Aug. 4.

CALEDONIAN RAILWAY COMPANY . APPELLANTS;

AND

DAVIDSON AND OTHERS . . . . . RESPONDENTS.

Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 *Vict. c.* 19), *ss.* 117, 119 —*Railway—Reservation of Minerals—Conveyance of Surface—Costs.*

The appellants purchased the rights of a feuar, in whose feu contract the minerals were reserved by the superior, the respondents' predecessor. In 1892 a controversy arose between the appellants and the respondents as to the position of the appellants in respect to their dealing with minerals both above and below the authorized formation of level of the appellants' line. In 1894 the Court of Session decided that the respondents were entitled to the minerals below the authorized formation, and reserved to the respondents any claim they might have for the value of the minerals in the said lands above the authorized level of the railway, to be determined by arbitration in terms of the Lands Clauses Consolidation (Scotland) Act, 1845, s. 117. In 1896 the respondents applied for compensation for the minerals above the surface. The appellants denied that they were under any liability for compensation, claiming to have purchased the minerals in their conveyance from the feuar of the surface, and that it was within their right to remove them. The respondents then commenced this action, contending that the appellants stood now to be treated as trespassers, it being too late for them to rely on s. 117 of the Act of 1845, they not having lodged a notice to treat within six months from the decision in 1894. The appellants contended that if they were wrong in their claim of ownership, they were still entitled to pay for the minerals by way of compensation, and not by damages, the six months given by the said Act not yet having commenced to run, as they had all along disputed the respondents' right:—

Held, reversing the decision of the Court of Session, that there had been no final determination, within the language of the section, of the respondents' right, and that, although this House now held their claim good, yet the appellants were not trespassers, and were entitled to the minerals upon payment of compensation:

Held, also, that the claimants (the respondents) were the proper parties to initiate a claim which it would have been possible for the appellants to satisfy.

APPEAL from a decision of the Second Division of the Court of Session, Scotland. (1)

(1) (1899) 37 S. L. R. 150, 406.

The question raised in this appeal was whether the respondents, Davidson and others, were entitled either to damages or to compensation for minerals above the formation level taken by the appellants, the Caledonian Railway Company, in the course of constructing their railway. The main contention of the respondents was that the appellants were liable to pay damages as trespassers, as they had not lodged a notice to treat within six months of a previous litigation in 1894, in accordance with s. 117 of the Lands Clauses Consolidation (Scotland) Act of 1845. The appellants argued that they had always denied the right of the respondents to the minerals; and if it was now decided that the respondents had a right to the minerals, the appellants had six months to treat for the minerals they had by mistake or inadvertence omitted to purchase; and that compensation was to be obtained by arbitration under s. 117 of the said Act. (1)

In 1874 the respondents' predecessor feued to one Thomas Allan a small piece of ground, reserving the minerals, including the freestone, with power to work them on payment of surface damages. In 1888 the Glasgow Central Railway Company

(1) Sect. 117 of the Lands Clauses Consolidation (Scotland) Act, 1845, provided: "If at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special Act . . . . they were authorized to purchase, and which shall be permanently required for the purposes of the special Act, any party shall appear to be entitled to any estate, right, or interest in or charge affecting such lands which the promoters of the undertaking shall through mistake or inadvertency have failed or omitted duly to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or in case the same shall be disputed, then within six months after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same . . . . and such purchase-money or compensation shall be agreed on or awarded and paid in like manner as according to the provisions of this Act the same respectively would have been agreed on or awarded and paid in case the promoters of the undertaking had purchased such estate, right, interest, or charge before their entering upon such land, or as near thereto as circumstances will admit."

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obtained statutory powers for the construction of a railway and a goods and passenger station which involved the taking of this piece of ground; and in 1889 the powers of that company were transferred to the appellants. The compulsory powers under the Act of 1888 expired in 1891. Prior to that date the appellants served a notice to treat on the trustee of the then deceased Thomas Allan for compulsory purchase of the said ground, and this ground was afterwards conveyed to the appellants, "together with the mines and minerals, including therein the freestone, under and within the said lands in so far and to such extent only as I, trustee foresaid, have right to the said mines, metals, minerals, and freestone."

The appellants entered into possession, and in the construction of their works removed a considerable quantity of the freestone both above and below the formation level of the railway.

In these circumstances the respondents in 1892–94 raised two actions (which were conjoined) to have it declared that they were the sole proprietors of the minerals, and that the appellants had no right to work them, except a limited right of use conferred on the feuar by his title; alternatively, they asked for declarator that the appellants had no right to work the freestone except on condition of paying compensation to the respondents. In defence to that action the appellants pleaded that they were entitled to work out and remove the freestone so far as necessary for the construction of the railway and works, and were willing to pay for the stone removed so far as not necessary for that purpose; they further pleaded that the respondents' interest in the whole freestone was an omitted interest within the meaning of s. 117 of the Lands Clauses Consolidation (Scotland) Act, 1845.

In June, 1894, the Lord Ordinary (Lord Stormonth-Darling) found in favour of the first alternative conclusions of the respondents' summons, namely, that the respondents were the sole proprietors of the whole minerals, and that the appellants had not, and never had, any title in the same; and, secondly, that the appellants were entitled to take proceedings to assess the compensation for the same under s. 117 of the Act of 1845. (1)

(1) Ante, p. 23, n. (1).

On July 19, 1894 (1), the Second Division recalled the decision of the Lord Ordinary, and found "that the respondents were the sole proprietors of the whole" minerals in the ground in question, "subject to the rights conferred upon Thomas Allan and conveyed by his trustee to the appellants; allowed both parties a proof of their respective averments on record in regard to the freestone and other minerals situated" in the said ground, "so far as lying below the authorized formation level of the railway"; "reserving to the respondents any claim they may have for the value of the coal, ironstone, freestone, and other minerals or metals in the said lands above the authorized level of the said railway, to be determined by arbitration in terms of the statute."

In his judgment the Lord Justice-Clerk said: "the respondents' counsel having stated they are willing that any question that may be between the parties regarding the minerals above the authorized formation level may be reserved to be settled by arbitration, we are now in the position of having to deal solely in the question regarding the minerals below the authorized formation level, and the proper course is to allow a proof in regard to the minerals below formation level." Subsequently, on October 29, 1895, the Court gave decree for 4257*l.* 7*s.* against the appellants as the compensation for the minerals and freestone below the formation level.

In the action of 1892–94 the appellants specially pleaded under s. 117, adding: "accordingly the appellants are willing and intend, in the event of decree being pronounced in terms of the said declaratory conclusions, to take and purchase the rights and interests of the respondents in the said ground, and the mines, metals, and minerals therein and thereunder, and to pay compensation to the respondents in respects of their said rights and interests as the same may be ascertained by arbitration in terms of the Lands Clauses Consolidation Acts." The rails at this part of the station being in a cutting, this use involved the use of the space formerly occupied by minerals above formation level. Matters so remained until 1896, when the respondents wrote to the appellants, asking if they had

(1) (1894) 21 R. 1060.

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any proposals to make in regard to the compensation for the stone lying above formation level which was reserved to them. On December 7, 1896, the appellants wrote that they did not admit liability for compensation for freestone rock removed above formation level. The result was this present action, in which both parties plead their extreme rights. The respondents claimed for damages or compensation for the freestone rock above formation level. The appellants maintained their right (first) to remove such freestone as they had met with in the ground above formation level as proprietors of the surface under their title from Thomas Allan without liability for either damages or compensation; (second) to remove the said freestone rock in the course of constructing their line under s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845, and (third) if and when the respondents made a claim; and in the event of its being held that the freestone rock in question was an interest in the land requiring to be purchased, the same was an omitted interest under s. 117 of the Lands Clauses Consolidation (Scotland) Act, 1845.

The respondents' case was that, assuming the 117th section was originally applicable and that the appellants ought to have at first disputed the right and interest of the respondents, that dispute was ended and the respondents' right finally decided by the judgment of July 19, 1894; from that date they contended the period of six months began to run during the currency of which the appellants were bound to serve a notice to treat, and thus to set in motion the statutory proceedings, which they failed to do; and therefore the appellants were to be dealt with as trespassers, who, besides paying the value of the minerals taken from above formation level, must now be removed from the space previously occupied by the minerals. To this the appellants contended that the six months did not run from the date of the judgment—1894—and had not yet begun to run. They said that they had all along disputed the superiors' (respondents) interest, and had kept the dispute open.

The Second Division (Nov. 28, 1899 (1)), reversing the decision of the Lord Ordinary (Lord Pearson), held that the

(1) 37 S. L. R. 150.

appellants could not avail themselves of the provisions of s. 117, the period of six months prescribed by the section having long expired, and that the compensation the appellants were bound to make was the market value of the stone removed at the time of its removal. The Court then proceeded to assess the damages at 4148*l.* 13*s.* 6*d.* (1) This sum was arrived at on the principle of subjecting the appellants to liability in damages as for a trespass as opposed to compensation for an interest in land taken or injuriously affected.

Aug. 1, 4. *A. Graham Murray, L.A.*, and *Haldane, K.C.* (the former of the Scottish Bar), for the appellants. The decision of the Court of Session appealed from is wrong, as it subjected the appellants to a liability in damages as for a trespass as opposed to compensation for an interest taken. The appellants were entitled to excavate the freestone above the formation level as ordinary purchasers from Thomas Allan, in the same way that an ordinary proprietor of the surface of an urban subject would be entitled to excavate to secure a safe foundation or adequate cellarage. If in the event of this not being found the appellants' right, then their liability to the respondents is a liability to pay compensation and not damages, and that compensation should be ascertained in terms of s. 117 of the Act of 1845, as for an omitted interest. When the appellants gave their notice to treat to Thomas Allan, the person having an interest in the surface, the bargain was then struck, and it was then too late to see that Allan's title was not a complete one.

As to the time from which the six months begins to run, the appellants have always claimed that they are entitled to the freestone above the formation level for nothing; and until the decision in this case is given by this House, that point is not finally decided. The interlocutor of the Second Division of July 19, 1894, did not decide it. That interlocutor recalled the Lord Ordinary's decision of June, 1894, and split the question of the right to the freestone into two questions, namely, the right to the freestone above, and the right to the freestone below formation level, and the Court held over the

(1) 37 S. L. R. 406.

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right to the freestone above the formation level to be settled by arbitration.

Scott Dickson, S.-G. for Scotland, and the *Hon. J. D. Fitz-Gerald, K.C.* (the first of the Scottish Bar), for the respondents. The decision of July 19, 1894, held that the respondents were the proprietors of the minerals both above and below the formation level; that action was not confined to minerals and freestone below the formation level. Therefore the question of right was decided in 1894, and the appellants should have gone to arbitration within six months of that decision in accordance with the provisions of s. 117 of the Act of 1845. After that decision was given, the appellants challenged the right of the respondents; but that was an attempt to open the question again on another ground. So long ago as 1892 the appellants knew the terms of Thomas Allan's feu charter, and that Allan was restricted from taking freestone off the premises: see *Thomas* v. *Barry Dock and Ry. Co.* (1) Therefore, in the circumstances, the appellants must be treated as trespassers.

As to costs, although the case may be decided against the respondents, they are entitled to costs as between solicitor and client: see s. 119 of the Act of 1845.

[They also referred to *Errington* v. *Metropolitan District Ry. Co.* (2)]

A. Graham Murray, L.A., in reply. If the respondents' right was decided in 1894, it was the duty of the respondents to initiate the proceedings by way of arbitration. The appellants had no power to start it, and it is the fault of the respondents if the arbitration did not immediately proceed after the decision in 1894.

EARL OF HALSBURY L.C. My Lords, I confess this somewhat intricate litigation was not easily understood at first; but, thanks to the argument of the learned counsel, I think your Lordships have now clearly before you matters which, when looked at, admit of a very easy solution. It is clear that the whole question now is whether the machinery provided for

(1) (1889) 5 Times L. R. 360. (2) (1882) 19 Ch. D. 559.

assessing compensation between the railway company and the claimants is still applicable, or whether by reason of the lapse, or the supposed lapse, of six months the railway company who are now in possession are trespassers, so that the amount of compensation is no longer to be ascertained within the Act, upon principles perfectly familiar to the Courts, but what they have done is to be treated as an act of trespass, thereby admitting the aggravation of the damages incident to an action of trespass, as distinguished from an assessment of compensation for lands or interests in lands by the ordinary course of arbitration contemplated by the statute.

My Lords, it appears to me that the whole question comes to two very short points: in the first place, whether there has or has not been, more than six months before the initiation of this action, a final determination by the Courts of what the rights as between the parties were. I do not think there has. It appears to me that although in a certain sense the question of Allan's rights was determined, yet what those rights were and how far they were involved in the determination, or what was to be paid in respect of them, was in dispute between the parties, and, inasmuch as there has been no final determination within the language of the 117th section, I do not think the six months have elapsed.

Further, it appears to me that apart from that, after the history we have had of the proceedings between these parties, there is the further question, if that was a final determination, upon whom the obligation rested to initiate such further proceedings as would within the postponed period of six months have enabled the parties to arrive at a proper conclusion, and whose fault it was if they were not initiated. I certainly am of opinion myself that it was the duty of the claimant to make a claim which it would have been possible for the railway company to satisfy. It would seem in common sense that it is so. Supposing there were no litigation and no necessity for any further discussion of the matter, but that the company were prepared to pay, is it suggested that they are themselves to find out what the claimant wants? Surely, as a matter of common sense, a man who wants to be paid something must

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say what it is that he wants; the railway company might say, "We will pay you what you ask"; but instead of that, neither party appears to have done anything; and the result is that it is now claimed that the period within which the matter could be settled has elapsed, and the railway company are therefore to be treated as trespassers. My Lords, that does not appear to me to be business or common sense. The person who is claiming ought to have said what he claimed; and then, under the series of sections which the Lord Advocate has pointed out, when compensation was claimed, the company might either have agreed to pay that sum, or, if they wanted to dispute it, then the whole course of procedure would have been that which is pointed out by the statute.

My Lords, it appears to me that on both those grounds the appellants are entitled to judgment, and I therefore move your Lordships that the interlocutor appealed from be reversed.

LORD ASHBOURNE. My Lords, I entirely concur in the conclusion at which my noble and learned friend the Lord Chancellor has arrived. We have to deal with a very protracted series of litigations which have been proceeding for a considerable number of years in the Scottish Courts, and have finally resulted in the appeal which has been addressed to your Lordships, and which largely turns upon the consideration of some very technical matters.

In the earlier litigation which was started, a controversy arose as to the position of the appellants, the railway company, in respect of their dealing with minerals above and below the authorized formation. After many vicissitudes in that first litigation, one of those matters was decided—that is, the rights in reference to the minerals that were taken from below the authorized formation. But the Court scrupulously indicated, in my opinion, their intention of not giving any final decision in reference to the other matters; because upon the face of their order they put, "reserving to the pursuers any claim they may have for the value of the coal, ironstone, freestone, and other metals or minerals in the said lands above the authorized level of the said railway, to be determined by arbitration in

terms of the statute." And, to make it abundantly clear that it was the intention of the order not to deal conclusively or finally with that matter, but to leave the claim largely open, the Lord Justice-Clerk, in giving the decision upon which that order was founded, in his earlier sentences makes it abundantly plain, and states that in fact in putting in that reservation he was acting on the suggestion of the pursuers, that is to say the respondents here; and I should judge from the closing words of the Lord Advocate that he had expressed no opinion in reference to that, and that the putting in of those words was mainly the action of those who were then representing the pursuers.

My Lords, that being the position of the first action, nothing appears to have been done for a considerable time. There was then a correspondence, and finally there was the institution of the present action. When it came before the Lord Ordinary, Lord Pearson, he, in a considered and very closely reasoned judgment, gave his views upon the broad matter in controversy, which was this: whether the railway company were entitled to be treated as having rights under s. 117, the effect of which would be to have their compensation assessed on one clear basis, or whether they were, in the event which happened, to be regarded as trespassers and to have damages assessed against them on that basis. Lord Pearson, on that broad topic of controversy between the parties, arrived at the conclusion that the railway company were entitled to the benefit of having their compensation assessed under s. 117 of the statute so often referred to. That was reversed by the learned judges who sat in the Second Division, and they arrived at the conclusion that practically the railway company were deprived of the protection and the benefit of s. 117, and that they were bound to submit to the assessment against them of damages practically as trespassers. It is from that decision this appeal is brought.

That has been met on behalf of the Messrs. Davidson, the claimants, with a technical answer: they have said that there was a time when s. 117 might have been appealed to with effect on behalf of the railway company, but that the time has lapsed

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—that they were only entitled to six months from the final decision, and that that date is to be found in the final decision which was pronounced in the first action, and that the six months having expired they have lost the right to appeal to s. 117, and they must therefore submit to the assessment of damages against them as trespassers. Of course, it is obvious that that is a technical answer; if it is well founded it must be yielded to; if it is not, it must be overruled. I concur in the conclusion that has been announced by my noble and learned friend on the Woolsack, in the result that he has arrived at as to the date from which the six months must run. The litigation must be taken as a whole, and I cannot regard the decision which contains the reservation which I have read, which was pronounced in the year 1894, as being a final decision in reference to the matter which was discussed so much, and which was practically the subject-matter of the second action. If that is so, the date from which the six months must run is to be found, not in the first action, but in the final decision which is to be pronounced now in the second action. That being so, it is enough to warrant a reversal of the decision which has been arrived at.

My Lords, the second ground referred to by my noble and learned friend on the Woolsack is not so entirely clear to my mind. I am disposed to think that possibly either side might have taken some action to call into effective operation s. 117; but I am inclined to think, in accordance with the opinion at which my noble and learned friend has arrived, that the claimants were the persons most called upon to formulate in some set terms what was their claim in respect of the compensation which they sought for the stone and minerals which were to be found above the formation level; but the first ground is sufficient for our decision. For these reasons I entirely concur in the motion which my noble and learned friend has made.

LORD ROBERTSON. My Lords, the ground on the merits ultimately maintained by the Lord Advocate is that any money which he is liable to pay is compensation under s. 117 as for an

omitted interest; but the question whether he is entitled to that remedy depends upon the position of his first alternative contention that under the title which he acquired from Allan's trustees he was entitled as of right and without paying compensation to work out the minerals which he has excavated. The respondents say that this contention was finally negatived in the former action, and that the six months within which s. 117 was available ran from the date of that decision and are now expired. The precise question is, therefore, whether the contention on the title derived from Allan's trustees was negatived in the action which preceded this one.

Now, my Lords, when one turns to the interlocutor of the Second Division founded on, I observe these things: first, that, confronted with the interlocutor of the Lord Ordinary which had dealt on its merits with that question, the Second Division recalled that interlocutor; secondly, that, instead of negativing the plea upon Allan's title, it found that the pursuers were sole proprietors of the whole of the coal and other minerals subject to the rights conferred upon Thomas Allan and conveyed by his trustee to the defenders; and, thirdly, that that which is reserved for the determination of the arbitration is any claim that the pursuers may have for the value of any coal and other minerals in the lands above the authorized level.

Now, my Lords, it seems to me that that does not present the material for a plea of res judicata. There must, for a plea of res judicata to be sustained, be an adjudication by the Court of the matter said to be res judicata; and in the terms of this interlocutor I cannot find an adjudication of the rights of the appellants in the minerals above the level. But, my Lords, I find a strong confirmation of this view when I come to the proceedings of the Second Division themselves in the present action, because the Lord Ordinary discusses this very question of the effect of the proceedings in the first action upon the plea, and he holds that everything was open. I put it concisely, but that is the substance of his judgment. He says: "It does not appear to me that the defenders, in standing on their amended averments, and asking for a proof of them, are going in any respect counter to anything that was the subject of decision in

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that action; though it may be they are going against the assumption of the pursuers when they made the concession, namely, that the company admitted liability for the minerals above formation level, and were willing to go to arbitration under the statute to ascertain the amount to be paid for them as compensation." That is a perfectly unambiguous declaration in favour of the freedom of the present appellants to raise this objection. What does the Second Division do? On December 23, 1898, "The Lords, having heard counsel for the parties on the reclaiming note for the defenders against the interlocutor of Lord Pearson, dated 4th November, 1898, Recal hoc statu the finding of the Lord Ordinary in regard to the first declaratory conclusion of the summons: Quoad ultra remit to the said Lord Ordinary to allow the parties a proof of their averments." First of all, that recall of the declaratory conclusion really set things still more at large than they had been before; and, secondly, as regards the adherence to the allowance of a proof, that would have been wholly unnecessary if the view of the Court had been that the matter was concluded and decided by the previous interlocutor. Therefore I am not prepared to sustain the plea that this matter was settled as regards the upper minerals by the decision of the Court in 1894. I think the fair reading of that decision is, that it cut the case into two as regards the upper and the lower minerals; that it decided the case as regards the lower minerals, and purposely left everything at large as regards the higher minerals. That, my Lords, is sufficient for the decision of this case.

On the second question, as to who requires to take the initiative in a proceeding of this kind, I should like to speak with some reserve. At present I should be disposed to agree with what was said by my noble and learned friend on the Woolsack; at the same time, as the matter is one of some intricacy and I have not had an opportunity of maturely considering it, I reserve my opinion upon that point.

LORD LINDLEY. My Lords, I am of the same opinion. Some difficulty arises in discovering the true construction

and effect of the order of July 19, 1894; but one thing is perfectly plain to my mind, that it did not settle the rights of Allan's trustees and the railway company as claiming under them in any final way. The fact is that those rights have been disputed up to the present time, and there has been no decision yet as to what the company's rights as his successors really are. What has been decided, and all that has been decided so far as I can make out, is that the value of the minerals used on the premises is 400*l.*, that is all. But that is not by any means an end of the controversy: it may be taken as one item, and probably that item is disposed of; but there are much larger questions which were in dispute, and have been in controversy ever since, and have never been decided at all. I cannot, therefore, think that the right to have this claim ascertained as a matter of compensation is precluded by the lapse of six months. That, to my mind, carries the whole case.

Scott Dickson, S.-G., called the attention of the House to s. 119 of the Lands Clauses Consolidation (Scotland) Act, 1845.

The House reversed the interlocutor appealed from with costs.

The respondents immediately lodged a petition as to costs, claiming them.

AS TO COSTS.

Aug. 5. EARL OF HALSBURY L.C. I understand that the Lord Advocate and the Solicitor-General for Scotland are both here, and that a question has arisen as to the costs in the case.

Scott Dickson, S.-G., for the respondents. The appellants down even to their appearance here maintained, and your Lordships took that view, that the question of right to the surface minerals was still open, and your Lordships have held that that question has only now been determined by the judgment of this House. Therefore the appellants here, down to the very last, have disputed that the minerals belonged to the respondents, and it has been determined now adversely to

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the appellants, the result being that the case clearly comes within s. 119.

A. Graham Murray, L.A., for the appellants. There is no doubt the costs must be between solicitor and client, and I quite see that the question on which I was wrong had to be kept open till the very last; but now the point is, how to apply the order to the costs of this proof. My learned friend cannot go the length of saying that the 119th section applies to the whole proof.

Scott Dickson, S.G. There was not merely a question of law between us; the appellants put in an averment that in ordinary building operations by a surface owner it might be necessary to go down twenty or thirty feet for the construction of the cellars, and that the appellants had done no more than an ordinary surface proprietor, and a long proof was put in in respect of the matter.

EARL OF HALSBURY L.C. We cannot determine the details of that. We can give you the costs in the language of the statute. We did not sufficiently consider the language of s. 119 yesterday as to costs.

LORD ROBERTSON. You have no objection that the costs, according to the language of the statute, shall be settled by the proper officer of the Court of Session?

Scott Dickson, S.-G. No.

A. Graham Murray, L.A. That would content me if there is no misunderstanding about what is open to me. I have an entirely different view from the Solicitor-General as to the proof.

LORD ROBERTSON. According to our Scottish practice, if it is sent down to the Court, the first thing the Court will have to do will be to apply the judgment, and in applying it they will consider the bill of costs as taxed.

EARL OF HALSBURY L.C. That will do. Counsel for both sides will assist the proper officer of the Court as to what you think the proper order under the circumstances.

Ordered and adjudged, That the interlocutors of the Second Division of November 28, 1899,

and January 13 *and March* 17, 1900, *be reversed, and that the interlocutor of the Lord Ordinary of May* 9, 1899, *be varied by striking out therefrom the words: "Sists process hoc statu, that either party may take such steps as they may be advised to initiate proceedings under the said* 117*th section: Finds the pursuers entitled to expenses as between agent and client down to the* 4*th November,* 1898, *reserving as to expenses quoad ultra: Allows an account thereof to be lodged, and remits the account to the auditor for taxation and report; and grants leave to reclaim," and that, subject to the said variation, the interlocutor of the Lord Ordinary be restored: And it is further ordered, That the appellants do pay, or cause to be paid, to the respondents, the expenses incurred by them in the Court of Session and in this House, in terms of the* 119*th section of the Lands Clauses Consolidation (Scotland) Act,* 1845, *with this declaration, That the auditor of the Court of Session, subject to the review of the said Court of Session, and the Clerk of the Parliaments respectively, shall determine and certify what expenses in the action in the Court of Session and of the appeal to this House properly fall within the said* 119*th section, such expenses to be taxed as between agent and client: And it is further ordered, That the said respondents do repay, or cause to be repaid, to the said appellants the principal sum of* 4148*l.* 13*s.* 6*d. specified in the said interlocutor of January* 13, 1900, *hereby reversed, together with the interest thereon from April* 13, 1897, *to April* 26, 1900, *amounting to* 631*l.* 19*s.* 1*d., already paid by the said appellants to the said*

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respondents, and do also repay, or cause to be repaid, to the said appellants the pursuers' expenses in the Court of Session, amounting to 649*l.* 15*s.* 8*d.*, *together with interest thereon to the said* 26*th day of April,* 1900, *amounting to* 3*l.* 18*s.* 4*d.*, *and the Court dues of extract, amounting to* 2*l.* 4*s.*, *already paid by the said appellants to the said respondents: And it is further ordered, That the said respondents do pay, or cause to be paid, to the said appellants the expenses incurred by them in the Court of Session and in this House, other than those falling within the said* 119*th section, the amount of the said expenses of the appeal to this House to be certified by the Clerk of the Parliaments: And it is further ordered, That the cause be remitted back to the Second Division of the Court of Session in Scotland to do therein as shall be just and consistent with this declaration and judgment.*

On November 27, 1902, the agents of the parties appeared before the Appeal Committee. The respondents contended that they should not be called upon to pay any costs; and the appellants asked for interest on the sums ordered to be repaid by the respondents.

The Appeal Committee (Earl of Halsbury L.C. and Lords Shand, Davey, and Robertson) refused both applications, and declined to make any alteration in the order.

Lords' Journals, August 4, 5; November 28, 1902.

Agents for appellants: *Grahames, Currey & Spens, for Hope, Todd, Kirk, W.S., Edinburgh, and H. B. Neave, Glasgow.*

Agent for respondents: *John Kennedy, W.S., for Campbell & Smith, S.C.C., Edinburgh, and Brown, Mair, Gemmill & Hislop, Glasgow.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ONTARIO . APPELLANT;

AND

ATTORNEY-GENERAL FOR QUEBEC . RESPONDENT.

J. C.*
1902
July 10;
Nov. 12.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Award—Jurisdiction of Arbitrators—Deed of Submission—Construction.

By agreement of submission dated April 10, 1893, the provinces of Ontario and Quebec referred to a statutory tribunal the "ascertainment and determination of the amount of the principal of the Common School Fund and the method of computing" interest thereon, and of the amount for which Ontario was liable. That fund was established by Canadian Act (12 Vict. c. 200), and consisted (inter alia) of the proceeds of public lands received by Ontario and paid to the Dominion:—

Held, that a claim by Quebec that Ontario should be debited with uncollected prices of lands sold by it, being a claim for wilful neglect and default and in the nature of damages, not suggested in but heterogeneous to the matters actually specified in the submission, was not on its true construction included therein.

APPEAL from a judgment of the Supreme Court (Nov. 16, 1901) allowing an appeal by the respondent from an award dated September 13, 1900, referring it back to the arbitrators for reconsideration, and declaring that they had jurisdiction to hear and adjudicate upon the claims of the province of Quebec in the said award referred to.

The question of the arbitrators' jurisdiction was the only one in appeal. It depended upon the construction of the deed of submission, which contained in clause 3, so far as is material, the following sections specifying the matters referred:—

"(*g*) The rate of interest, if any, to be allowed in the accounts between the two provinces, and also whether such interest shall be compounded, and in what manner.

"(*h*) The ascertainment and determination of the amount

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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of the principal of the Common School Fund, and the method of computing such interest.

"(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration, not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold."

Quebec claimed that the amount of uncollected balances of the prices of Common School Lands sold before December 31, 1892, should be ascertained, and that the province of Ontario should be charged or debited, and the Common School Fund credited therewith, or with such proportion thereof as was right, fair, and just. Ontario objected that this claim was not within the jurisdiction of the arbitrators, who upheld the objection. The Supreme Court overruled the objection and remitted the award.

The view of the Chief Justice is expressed as follows: "The clear and distinct words of the reference, which require the arbitrators 'to take into consideration the amount for which Ontario is liable,' seem to us to make it impossible that a claim that Ontario is liable for uncollected balances of purchase-money as well as for the wilful default and neglect of its officers can possibly be outside the terms of the reference. Whatever may be the result upon the merits, at least the province of Quebec, when it asserts a claim for these moneys remitted and lost to the fund, or not realized, by the omissions of Ontario, is entitled to be heard and cannot be repelled in limine upon the pretension that there is a want of jurisdiction when, in the very words of the submission it is referred to the arbitrators to ascertain the amount of Ontario's liability."

Blake, K.C., and *Irving, K.C.*, for the appellant, contended that the submission was as to the Common School Fund and was not on its true construction of all matters in difference, but only of the matter of account stated in sub-ss. (*h*) and (*i*) of clause 3 of the reference. It relates to sums actually or constructively received by Ontario. It does not include any question of

liability for uncollected balances which have not been received by her. Such balances are still in the hands of the purchasers. If it is contended that Ontario is liable as for wilful neglect or default or breach of trust, that liability is not included in the reference. Consequently, the arbitrators were right in holding that they had no jurisdiction to deal with the uncollected balances not in the appellant's hands.

Asquith, K.C., Duffy, K.C., and *Frank Russell,* for the respondent, contended that by reason of Ontario's neglect or omission to collect purchase-moneys, the Common School Fund had been largely diminished. Accordingly, in the settlement of accounts referred between the two provinces, and as a question arising out of or relating or incident to the settlement of those accounts, the arbitrators had jurisdiction to deal with Quebec's claims. The terms of the reference were wide enough in their scope to confer it; and the arbitrators were bound to take into consideration, not only the amount of the Common School Fund actually in hand, but also "the amount for which Ontario was liable"—words which were not limited in their meaning to moneys actually received.

Blake, K.C., replied.

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The judgment of their Lordships was delivered by

LORD ROBERTSON. The judgment appealed against was pronounced by the Supreme Court of Canada in the exercise of a statutory jurisdiction, and it declares that the arbitrators whose award was before the Court had jurisdiction to hear and adjudicate upon certain claims made by the province of Quebec. The question before their Lordships is whether that decision is right.

The arbitrators derive their original power from certain statutes (in identic terms) of Canada, of Ontario, and of Quebec; but the instrument upon which the present question turns is an agreement of submission dated April 10, 1893. The tribunal was established for the amicable settlement of any questions which might arise in the settlement of accounts between the Dominion and the provinces and between the two provinces, and is conceived in general terms applicable to the

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various possible questions which might come to be submitted for decision. The arbitrators are not to be bound to decide according to strict rules of law, but may decide on equitable principles; but when they do proceed on their view of a disputed question of law, the award must set forth the same, at the instance of either party, and the award is then subject to appeal, so far as relates to such decision, to the Supreme Court, and thence to the Privy Council, in case their Lordships are pleased to entertain the appeal. The award now under consideration purports to proceed upon the view of a majority of the arbitrators on a disputed question of law, and hence the proceedings in the Supreme Court of Canada and the present appeal.

The questions submitted to the arbitrators by the agreement of April 10, 1893, with which this appeal is concerned, relate to what is known as the Common School Fund. The origin of this fund was a statute of the province of Canada, passed in 1850 (12 Vict. c. 200), the object of which was to provide a perpetual fund for the support of common schools and the establishment of township and parish libraries. The source of this fund was to be one million acres of public lands, which were to be set apart and appropriated by the Commissioner of Crown Lands, under the direction of the Governor in Council, in such part or parts of the province of Canada as he might deem expedient, and were to be sold in order to the investment of the proceeds towards creating the school fund. The purposes of this enactment were thus common to the whole province of Canada, as it then existed; and, as the lands to be set apart were public lands, those purposes were to be accomplished at the cost of the whole province. As it happened, the lands chosen and set apart by the Commissioner under this Act were situated in the Huron tract, in what is now the province of Ontario.

The effect of the British North America Act of 1867 was that the province of Ontario became owner of those lands so far as unsold. Questions having, not unnaturally, arisen out of the situation thus produced, advantage was taken, in 1870, of the arbitration set up by the 142nd section of the Act of

1867 to invoke that tribunal in regard to the school fund; and by award dated September 3, 1870, certain things were decided, and (inter alia) it was laid down (art. 9) that the moneys received by Ontario since June 30, 1867, from the Common School Lands should be paid to the Dominion to be invested as provided in the Act of 1859, and the income was to be divided between Ontario and Quebec on the principle of that statute. By art. 10 it was laid down that Ontario should be entitled to retain out of such moneys 6 per cent. for the sale and management of such lands. (Any question which might have arisen as to the jurisdiction of the arbitrators in making this award has been set at rest by a decision in an early stage of the present arbitration that the award of 1870 was good and is to be followed.)

The experience of twenty-three years having resulted in a new set of questions, the agreement of submission of 1893 was entered into; and in that agreement the third article was as follows:—

"(3.) It is agreed that the following matters shall be referred to the said arbitrators for their determination and award in accordance with the said statutes, namely:—

"(*g*) The rate of interest, if any, to be allowed in the accounts between the two provinces, and also whether such interest shall be compounded, and in what manner.

"(*h*) The ascertainment and determination of the amount of the principal of the Common School Fund, and the method of computing such interest."

On March 6, 1896, an award was pronounced, of which the following is the part which is relevant to the present narrative:—

"(2.) That in computing the amount of principal money of the Common School Fund, for which the province of Ontario is liable, the following sums shall be deemed to be and shall be treated in all respects as moneys received by the province from or on account of the Common School Lands set apart in aid of the common schools of the late province of Canada, that is to say:—

"(*a*) Any sum of money due for principal or interest from

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any purchaser of said Common School Lands, remitted by the province of Ontario to the purchaser, unless it be shewn by the province that such remission was made in a fair and prudent administration of the Common School Lands and Fund; and

"(*b*) Any sum of money due for principal or interest from any purchaser of said Common School Lands, at the time when letters patent for such lands were issued to him by the province of Ontario, and not collected by the province, unless it be shewn by the province that there was good cause for not collecting the same.

"(3.) That where in a fair and prudent administration of the Common School Lands any sale of such lands has been cancelled by the province of Ontario, and the same resold at a price less than that first obtained, the province shall not be liable for the loss resulting therefrom.

"(4.) That in computing the amount of interest due from the province of Ontario to the Common School Fund on the thirty-first day of December, eighteen hundred and ninety-two, such interest shall be computed and made up at the rate of five per centum per annum, and shall be compounded half-yearly."

On December 9, 1899, there was placed before the arbitrators the statement of claim by the province of Quebec, which is the subject in dispute, and the question before their Lordships is whether that claim is within the jurisdiction of the arbitrators. The paper is a long one, but the first seven articles are expressed as representing the claim, the remaining thirteen articles being introduced by the words, "And in support of her present claim Quebec further says." The first seven articles are as follows:—

"1. Inasmuch as Quebec claims that by law and statutes governing the same, and particularly by chap. 26 of the Consolidated Statutes of Canada, the British North America Act, 1867, the awards of 1870 and of this board, and the judgment of the Supreme Court, and also on equitable principles, Quebec and her people were and are entitled to have and enjoy Quebec's share of all moneys arising or capable of being derived from the sale or disposition of the one million acres of Common

School Lands mentioned in chap. 26 of the Consolidated Statutes of Canada as fully and beneficially in all respects as Ontario and her people were and are entitled to have and enjoy Ontario's share of the same.

"2. And inasmuch as Quebec claims that she and her people have not so enjoyed her share of said moneys but have been and are kept by Ontario illegally, inequitably, and unjustly out of Quebec's share and enjoyment of a large portion of said moneys, to wit, that portion represented by the uncollected balances due on said Common School Lands and mentioned in statement No. 6 of Mr. Hyde, filed herein, which Ontario and her people, in effect, have had and have the exclusive use, benefit, and enjoyment of, and which Ontario by her acts and conduct has virtually and in effect appropriated and applied to the use and benefit of herself and her people.

"3. Therefore, in order that Quebec and her people may obtain the benefit they are entitled to on account of their share of the amount of said uncollected balances to the extent of at (1) least herein asked, and the amount of the Common School Fund be further declared and ascertained.

"4. Quebec hereby gives notice of, and asks the honourable arbitrators to determine in due course in her favour, the following claim which Quebec makes against Ontario on account of said uncollected balances mentioned in said statement No. 6.

"5. Quebec asks—without prejudice to her right to make further proof should she see fit or this honourable board so order—that the long delay of upwards of a quarter of a century on the part of Ontario to collect in said balances, with other facts of record before this honourable board, be of themselves taken, and held a presumption and proof against Ontario of her failure to carry out her obligations to collect in said balances and render Ontario at least primâ facie liable as herein asked by Quebec.

"6. That the said uncollected balances, to wit, both of principal and interest, mentioned in said statement No. 6, ought to be and be deemed, held and treated, in all respects as moneys received by Ontario from or on account of the Common

(1) *Sic.*

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School Lands and as part of the principal of the Common School Fund or moneys in the hands of Ontario on the 31st of December, 1892, at the latest, and for which Ontario then was, and still is, liable with interest.

"7. That in default of the honourable arbitrators determining that the said 31st of December, 1892, is a proper date by which said balances are to be deemed as part of the principal of the said Common School Fund in the hands of Ontario, and for which she is liable, that they do fix and determine the proper date or dates at or by which Ontario ought to be considered to have received said balances; Quebec alleging that Ontario ought to have collected in the said balances long prior to 1892."

Against this claim the province of Ontario, on May 22, 1900, filed an interim plea, alleging that the matters embraced in the claim are not, nor is any of them, cognizable by the arbitrators, and that the said matters are not, nor is any of them, within the terms of the submission, and that the arbitrators had no jurisdiction nor power to inquire into or make any award upon them. Quebec having filed a formal replication, asked the arbitrators to award and adjudicate on the issues raised by Ontario's answer; and on September 13, 1900, the arbitrators issued the award in question, by which the majority, namely, Sir John Boyd and Burbidge J. (Sir Louis Napoleon Casault dissenting), awarded, ordered, and adjudged that the arbitrators had no authority or jurisdiction to entertain the claim of Quebec. It was declared that this award was made without prejudice to the rights and interests of Quebec in the uncollected balances, and to its right to have the same saved and excepted in any final award made in the matters submitted. An appeal having been taken by Quebec to the Supreme Court of Canada, that Court (Gwynne J. dissenting) allowed the appeal, and declared that the arbitrators had jurisdiction to hear and adjudicate upon the claim in question.

The controversy upon which this difference of opinion has taken place, alike among the eminent arbitrators and in the Supreme Court, depends primarily upon what is the true import of the claim itself. The judgment delivered by the Chief

Justice on behalf of the majority of the Supreme Court can hardly be supported as presenting an accurate statement of the claim; for of the four elements into which he analyzes it only one is actually present, namely, a claim for uncollected balances of purchase-money. It is also to be observed that in expressly adopting the arguments stated by Sir Louis Casault, the majority of the Supreme Court have accepted arguments which led to the rejection by that learned arbitrator of all the specific applications expressed in the claim of Quebec.

In ascertaining the true nature of the claim of Quebec, it is necessary to observe that the claim relates to the uncollected prices of lands sold by Ontario and to nothing else. The case, be it understood, is that of lands sold but no title to which has yet been granted. The gravamen is that those sales ought to have been completed and the prices ought to have been collected long ago, and that those prices have not been collected. Apart from this, Quebec has no case and does not profess to have one. The respondent endeavoured to make out that he was not necessarily committed to the very strong statements made in the claim of wilful violation of duty. Now, while it may not be of the essence of the claim to advance, as the respondent has done, the theory that those moneys have not been collected because it is the settled purpose of Ontario to keep them in the province, the facts set out in the claim amount to a case of wilful neglect and default and to nothing else, and the remedy sought is that those moneys which are not in the hands of the defaulter shall be treated as if they were and shall be debited against him. This is the gist of the claim—a claim against a trustee who, whether from intention or from negligence, leaves moneys uncollected which he ought to have in his hands. The remedy claimed by Quebec is that Ontario shall be debited with a specific sum, to wit, $485,801 65c., interest to run on it from a stated date. This is an appropriate remedy for breach of trust, but it can be justified on no other ground.

Now, the question is whether such a claim falls within heads (*h*) and (*i*) of the submission. "The Common School Fund," the principal of which is to be "ascertained and determined,"

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according to the conception of the statutes which relate to it, consists of moneys in the hands of Government. Now, the substance of the claim of Quebec is that the Ontario Government is to be debited with what in fact is not in their hands, and is alleged to be uncollected owing to the fault of that Government. Their Lordships are unable to hold that a claim of this nature is to be found within the language of arts. (*h*) and (*i*) of the submission when there is no recital or suggestion of it in the rest of the submission. The question is not whether the claim is suitable for arbitration, but whether it has been submitted by this instrument. As their Lordships read the claim, it is a claim founded on wilful neglect and default and of the nature of damages, and is heterogeneous to the questions which are clearly included in the submission. The specified matters which the arbitrators are to take into consideration do not include the present claim, and the fact that they are mentioned makes it impossible to suppose that the parties would have omitted to mention the matter now in question, if it had been within the scope of the reference.

Their Lordships will humbly advise His Majesty that the judgment of the Supreme Court of Canada ought to be reversed, and the award of the arbitrators restored.

There will be no order as to the costs of this appeal.

Solicitor for appellant: *S. V. Blake.*

[PRIVY COUNCIL.]

IMPERIAL BANK OF CANADA . . . DEFENDANTS;

AND

BANK OF HAMILTON . . . . . PLAINTIFFS.

J. C.* 1902 July 30; Nov. 13.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Money paid under Mistake of Fact—Marked Cheque fraudulently altered—Negligence—Notice of Dishonour—Reasonable Delay.

A cheque for $5 certified by the respondent bank's stamp was fraudulently altered to $500 and paid by the respondent to the appellant, a holder for value, under a mistake of fact, which was not discovered till the next day.

In an action by the respondent to recover back $495 from the appellant:—

Held, (1.) that the respondent was at liberty to prove, as between itself and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified.

Scholfield v. *Earl of Londesborough*, [1896] A. C. 514, followed.

(2.) No negligence was imputable to the respondent in cashing the cheque without examining the drawer's account; and even if it were, it did not induce the appellant to treat the cheque as good.

Kelly v. *Solari*, (1841) 9 M. & W. 54, approved.

(3.) Notice of forgery was unnecessary, and the cheque for $5 was not dishonoured; and, accordingly, the stringent rule laid down in *Cocks* v. *Masterman*, (1829) 9 B. & C. 902; 33 R. R. 365, to the effect that notice of dishonour of a bill of exchange must be given on the due date, does not apply. The rule will not be extended to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by delay.

APPEAL from a decree of the Supreme Court (May 21, 1901) affirming a decree of the Court of Appeal for Ontario (Nov. 13, 1900) affirming a judgment in favour of the respondents for $495, with costs.

The question in this appeal was whether the respondents were entitled to recover back money paid under a mistake of fact, in the circumstances detailed in the judgment of their Lordships. It arose in reference to what is known as a "marked cheque" or an "accepted cheque," pursuant to a method

* *Present*: LORD MACNAGHTEN, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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frequently employed for the purpose of adding to the credit of these negotiable instruments, and, as expounded by the Privy Council in *Gaden* v. *Newfoundland Savings Bank* (1), with the following effect: "A cheque certified before delivery is subject, as regards its subsequent negotiation, to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by shewing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn."

The Courts below decided in favour of the respondents' contention that, though there was a payment by them on January 27, yet that payment was recoverable on their notice and claim of January 28, as made under a mistake, namely, under the mistaken belief that the cheque presented for payment was in the same form in which it had been marked by them, and that they were therefore liable to pay it in full; whereas in truth it was not in that form, and they were not liable to pay it, save to the extent of $5, the amount having been fraudulently increased by the drawer to $500.

The appellants contended—(1.) That the respondents, having chosen to mark a cheque drawn in the form indicated, were liable to the appellants for the amount to which the drawer (availing himself of the obvious facilities afforded by that form) had raised it.

(2.) That there was here no such mistake as entitled the respondents to recover back the money paid to the appellants as bonâ fide holders for value of the negotiable security in question, and that, while the appellants had none, the respondents had all of the material facts within their possession, and were negligent in not availing themselves of their information on the presentation of the cheque.

(3.) That, under the applicable law, acceptance and payment once made of such a negotiable security was practically irreclaimable, or was at any rate irreclaimable after any appreciable delay, on the principle laid down by Mathew J. in *London and River Plate Bank* v. *Bank of Liverpool*. (2)

(1) [1899] A. C. 285. (2) [1896] 1 Q. B. 11.

The Court of Appeal differed in opinion. The majority affirmed the judgment in respondents' favour, and the judgment of Armour C.J., who dissented, is sufficiently quoted in their Lordships' judgment.

The judgment of the majority of the Supreme Court was delivered by Strong C.J. Gwynne J., who dissented, considered that the respondents were guilty of negligence in paying the cheque, notwithstanding their exclusive possession of the fullest possible means (of which they did not avail themselves) of knowing that they were under no obligation to pay it. It was not a mistake of fact which entitled them to recover, for they had full means of avoiding it. The cheque was valid and binding on the drawer, whose signature was genuine. The respondents had no superior equity to the appellants, who could not have discovered the fraudulent alteration of the cheque. The innocent holder for value had a better equity than the bank, which negligently omitted to refer to its books.

Blake, K.C., and *Bicknell, K.C.*, for the appellants, contended that the judgment of Gwynne J. was right. As between the appellants and respondents the only negligence was of the latter, who marked the cheque with a blank in it facilitating a fraudulent insertion, and then abstained from consulting their own books, which would at once, and did the next day, disclose the real facts. Even if the money had been paid under a mistake, the special limitations upon the right to recover back money so paid which apply to commercial or negotiable instruments preclude recovery here. The payment included, and in effect involved, an acceptance by the respondents of the cheque in the form in which it was presented. And the rules as to the effect of acceptance apply a multo fortiori to the effect of payment. There is a marked difference on the question of recovery of money as paid under a mistake of fact as between ordinary choses in action and negotiable securities. In the former case the holder is subject to, in the latter case he is free from, all the equities as between the original parties. Reference was made to *Robson*

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v. *Bennett* (1); *Gaden* v. *Newfoundland Savings Bank* (2); *Goodwin* v. *Robarts* (3), per Cockburn C.J.; see also (1876) 1 App. Cas. 476; *Freeman* v. *Jeffries* (4); *Cocks* v. *Masterman* (5); *Price* v. *Neal* (6); *Smith* v. *Mercer* (7); *Mather* v. *Lord Maidstone* (8): *Chambers* v. *Miller*. (9) The applicable rule is that laid down in *London and River Plate Bank* v. *Bank of Liverpool* (10), as supported by other authorities, namely, that in the case of commercial instruments it is essential that the presenter should know at once and finally the fate of the instrument: see *Pollard* v. *Bank of England* (11); *Durrant* v. *Ecclesiastical Commissioners* (12); *Robarts* v. *Tucker* (13), per Parke B.; *Bank of England* v. *Vagliano Brothers*. (14) It is not a technical distinction, but one based on the exigencies of business and the character of the documents, which requires that from the smallest delay prejudice should be presumed. In this case a whole day elapsed between payment and notice. It is not necessary to shew that any remedy has been lost.

Sir R. Reid, K.C., and *W. M. Douglas, K.C.*, for the respondents, contended that it was proved that they had paid $495 to the appellants under a mistake of fact, and were accordingly, upon discovery of the mistake, entitled to recover it back. There was no negligence in marking the cheque, for there is no duty on their part which in so marking they can be said to have neglected to fulfil. By marking it they became a party to a cheque for $5, and they were entitled to prove that, since marking it, the cheque had been fraudulently altered by a third party and converted into a forged marked cheque for a larger amount than that for which they admit liability: see *Scholfield* v. *Earl of Londesborough*. (15) As an unmarked

(1) (1810) 2 Taunt. 388; 11 R. R. 614.
(2) [1899] A. C. 281, 285.
(3) (1875) L. R. 10 Ex. 337, at p. 346.
(4) (1869) L. R. 4 Ex. 189, 197.
(5) 9 B. & C. 902; 33 R. R. 365.
(6) (1762) 3 Burr. 1354.
(7) (1815) 6 Taunt. 76; 16 R. R. 576.
(8) (1856) 18 C. B. 273.
(9) (1862) 13 C. B. (N.S.) 125, 134.
(10) [1896] 1 Q. B. 11.
(11) (1871) L. R. 6 Q. B. 623.
(12) (1880) 6 Q. B. D. 234.
(13) (1851) 16 Q. B. 560, 578.
(14) [1891] A. C. 107, 155.
(15) [1896] A. C. 514.

cheque it would not have been cashed for want of funds; the mistake was in supposing that the mark related to a cheque for the fraudulently inserted amount. It was a bonâ fide mistake, for they were not bound to suspect a fraud the moment they saw the cheque, and the routine of business did not permit immediate reference to their books. There was no suggestion that the appellants had been prejudiced in any way, either by the payment or its revocation the next day. The respondents' right to recover is not affected by any rule of the law merchant requiring immediate dishonour of a bill when presented for payment. That rule is confined to cases where there are other parties in the bill entitled to such notice, and against whom there are remedies to be preserved. In this case the appellants' only remedy was against the drawer of the cheque, and that was not dependent on notice of dishonour or in any way affected by a day's delay. No notice was required under any circumstances, for there had been no dishonour. The $5 were paid, and as to the $495 it was a forgery not discovered till next day, to which the technical rules as to notice had no application. Reference was made to the cases cited on the other side. *Smith* v. *Mercer* (1) was explained in *Wilkinson* v. *Johnston*. (2) Reference was also made to *Brownlie* v. *Campbell* (3); *Bell* v. *Gardiner* (4); *Woods* v. *Thiedeman*. (5)

Blake, K.C., replied.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether the Bank of Hamilton is entitled to recover from the Imperial Bank of Canada a sum of $495, paid to it in respect of a cheque under the following circumstances.

One Bauer was a customer of the Bank of Hamilton, and he drew a cheque upon that bank for $5. The word five was written, and a considerable space was left between that word and the next words printed on the cheque. The cheque was

(1) 6 Taunt. 76; 16 R. R. 576.
(2) (1824) 3 B. & C. 428, 438; 27 R. R. 393.
(3) (1880) 5 App. Cas. 925.
(4) (1842) 4 Man. & G. 11.
(5) (1862) 1 H. & C. 478.

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dated January 25, 1897, and on that day Bauer took it to the Bank of Hamilton and got it marked or certified with the bank's stamp; he then took it away with him. The effect of this marking or certifying was examined and explained by this Board in *Gaden* v. *Newfoundland Savings Bank*. (1) The effect was to give the cheque additional currency by shewing on its face that it was drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of Bauer, who drew it, the credit of the Bank of Hamilton, on which it was drawn. The cheque was a good cheque for $5, and if it had not been altered the Bank of Hamilton would have paid it as a matter of course, and no difficulty would have arisen. But after Bauer had got it marked he wrote in the word "hundred" after the word five. The cheque then appeared to be a certified cheque for $500. There can be no doubt that the condition of the cheque when certified afforded opportunity for this fraudulent alteration; and if the principle laid down in *Young* v. *Grote* (2) could still be acted upon, the Bank of Hamilton would, as between themselves and an innocent holder for value, be estopped from denying that the cheque was a certified cheque for $500. But after the decision of the House of Lords in *Scholfield* v. *Earl of Londesborough* (3), it was hopeless to contend that by the law of England the Bank of Hamilton was not at liberty to prove that the cheque had been fraudulently altered after it had been certified by the bank. Whether the French law, which prevails in Lower Canada, is the same in this respect as the law of this country and of Ontario has not to be determined; for the French law has no application to this case.

Bauer took the cheque as altered to the Imperial Bank of Canada, and opened an account with it. The cheque was placed to his credit; he forthwith drew cheques upon the account so opened, and those cheques were honoured in the usual course of business. The cheque in question was passed by the Imperial Bank of Canada through the clearing-house at Toronto, and was paid by the Bank of Hamilton on the

(1) [1899] A. C. 281, at p. 285. (2) (1827) 4 Bing. 253; 29 R. R. 552.
(3) [1896] A. C. 514.

morning of January 27, 1897, the fraud not having been then discovered.

It is proved by the evidence that certified cheques, apparently in order and presented through the clearing-house, are paid as a matter of course, and that it is not usual with bankers to turn to their customers' accounts on the day marked cheques are presented for payment through the clearing-house to see whether there is anything wrong before paying them. It is, however, usual to check the returns with the customer's accounts the next day, and then to enter the cheques paid the day before. In conformity with this practice, the Bank of Hamilton paid the cheque on January 27 without looking at Bauer's account in their ledger; but on the next day, i.e., January 28, they turned to it, and at once discovered the fraud. The Bank of Hamilton immediately gave notice to the Imperial Bank of Canada and demanded repayment of $495, being the amount paid by the Bank of Hamilton in respect of the cheque, less the $5 for which it was drawn and certified. This demand not having been complied with, the present action was brought by the Bank of Hamilton to recover the $495. The action was defended on three grounds, namely, 1st, because the Bank of Hamilton was negligent in marking the cheque with the blank in it; 2nd, because the Bank of Hamilton was negligent in paying the forged cheque without first turning to Bauer's account; 3rd, because notice was not given to the Imperial Bank of Canada on January 27, the day on which the cheque was paid.

The action was tried by MacMahon J. without a jury, and he gave judgment for the plaintiffs, namely, the Bank of Hamilton. From this judgment the Imperial Bank of Canada appealed, and the Court of Appeal affirmed the judgment of MacMahon J., but Armour C.J. dissented. From this decision the Imperial Bank of Canada again appealed to the Supreme Court, which again affirmed the decision appealed from, Gwynne J., however, dissenting. The present appeal is from their decision.

The learned counsel for the appellants did not seriously rely upon the first of the three grounds of defence, feeling it to be

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untenable after the decision in *Scholfield* v. *Earl of Londesborough* (1), to which reference has already been made. They relied on the second and third grounds, on which alone there was any difference of opinion in the Courts below.

As regards negligence in paying the cheque: It cannot be denied that when the Bank of Hamilton paid the cheque on January 27 it had the means of ascertaining from its own books that the cheque had been altered. But means of knowledge and actual knowledge are not the same; and it was long ago decided in *Kelly* v. *Solari* (2) that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since, and their Lordships consider it applicable to the present case. There was nothing on the face of the cheque to excite suspicion, nor to lead the clerk who cashed the cheque to take the unusual course of referring to Bauer's ledger account to see if all was right before cashing it. Moreover, even if negligence in this respect could be imputed to the Bank of Hamilton, such negligence did not induce the Imperial Bank of Canada to treat the cheque as good and to give Bauer credit for its amount. That had been done already. These were the reasons which induced the Courts below to decide against the second ground of defence; and their Lordships have no hesitation in coming to the same conclusion.

There remains the third ground, which is based upon a supposed hard and fast rule referred to by Armour C.J., who said:—

"In my opinion this case is governed by the rule laid down in *Cocks* v. *Masterman* (3), where it said, 'But we are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or dishonoured bill, and that if he receives the money and is suffered to retain it during the whole of that day the parties who paid it cannot recover it back.'

"This rule, rigorous though it may be, has been adhered to

(1) [1896] A. C. 514. (2) 9 M. & W. 58.
(3) 9 B. & C. 902; 33 R. R. 365.

in England ever since: see *Mather* v. *Lord Maidstone* (1); *Durrant* v. *Ecclesiastical Commissioners* (2); *Leeds Bank* v. *Walker* (3); *London and River Plate Bank* v. *Bank of Liverpool* (4); Byles on Bills, 16th ed. 353.

"The application of this rule does not at all depend upon whether the holder of the bill is or is not in fact prejudiced by the delay, for the conclusion in law is that he may be prejudiced, and this is the reason of the rule.

"In this case the defendants, the holders in due course of the cheque, presented it to the plaintiffs on January 27 through the clearing-house, and it being due on presentation, the defendants were entitled to know on that day whether it was honoured or dishonoured.

"The plaintiffs paid the cheque through the clearing-house on that day; but this payment was, in my opinion, conditional upon their right to dishonour the cheque during that day, but not having dishonoured the cheque during that day such payment became absolute, and the defendants having received the money for the cheque from the plaintiffs, and being suffered to retain it during the whole of that day, the plaintiffs cannot recover it back."

The prejudice which it is suggested that the Imperial Bank of Canada may have suffered, from want of notice of dishonour on January 27, consists in their inability to take proceedings on that day against Bauer for the fraud which he had committed. But no one suggests that Bauer could have paid anything if he had then been proceeded against. The bank was not deprived of any of its rights against him, nor was its position altered by reason of notice of the forgery not being given until the day after the bill was paid.

But, quite apart from the fact that the appellants were not in any way prejudiced by want of notice on the day of payment, it appears to their Lordships that the stringent rule referred to in the foregoing extract from the judgment of Armour C.J. does not really apply to this case. The cheque as drawn and certified, i.e., for $5, was never dishonoured, and

(1) 18 C. B. 273.
(2) 6 Q. B. D. 234.
(3) (1883) 11 Q. B. D. 84.
(4) [1896] 1 Q. B. 7.

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no question arises as to that. The cheque for the larger amount was a simple forgery; and Bauer, the drawer and forger, was not entitled to any notice of its dishonour by non-payment. (1) There were no indorsers to whom notice of dishonour had to be given. The law as to the necessity of giving notice of dishonour has therefore no application. The rule laid down in *Cocks* v. *Masterman* (2), and recently reasserted in even wider language by Mathew J. in *London and River Plate Bank* v. *Bank of Liverpool* (3), has reference to negotiable instruments, on the dishonour of which notice has to be given to some one, namely, to some drawer or indorser, who would be discharged from liability unless such notice were given in proper time. Their Lordships are not aware of any authority for applying so stringent a rule to any other cases. Assuming it to be as stringent as is alleged in such cases as those above described, their Lordships are not prepared to extend it to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by the delay in giving it.

Their Lordships, therefore, will humbly advise His Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitor for appellants: *S. V. Blake.*

Solicitors for respondents: *Harrison & Powell.*

(1) See the Bills of Exchange Act, 1882, s. 50, sub-s. 2 (*c*).

(2) 9 B. & C. 902; 33 R. R. 365.

(3) [1896] 1 Q. B. 7.

Distinguished. BOILER, ETC., CO. OF CANADA *v.* SHERWIN-WILLIAMS CO. LD. [1951] A. C. 319

[PRIVY COUNCIL.]

BANK OF TORONTO . . . . . PLAINTIFFS;

AND

ST. LAWRENCE FIRE INSURANCE COMPANY . . . . . DEFENDANTS.

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July 15, 17, 18; *Nov.* 19.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Law of Lower Canada—Civil Code, arts. 1570 *and* 1571—*Construction—Signification to Debtor of Transfer of Debt.*

Under arts. 1570 and 1571 of the Civil Code of Lower Canada, signification to the debtor of the act of sale of his debt need not be by a notarial act.

Quære, whether the debtor is a "third person" within the meaning of the latter section against whom signification is necessary in order to perfect possession.

Murphy v. *Bury*, (1895) 24 Can. S. C. 668, doubted.

The institution of an action against the debtor is itself a sufficient signification of the transfer of the debt.

APPEAL from a decree of the above Court, affirming a decree of the Superior Court, which dismissed the appellants' action.

The appellants sued to recover $2500, being the amount of a claim which the John Eaton Company, Limited, was entitled to receive from the respondents under a fire policy, which claim had been, on May 22, 1897, sold by the said company to the bank, which alleged a due signification of the act of sale and delivery of a copy of it to the respondents, thereby completing their title as creditors of the respondents.

The Superior Court's dismissal of the action was on two grounds: (1.) That it did not appear that the proofs of loss had been received by the insurance company, though prepared by the Eaton Company; and (2.) That the signification of the act of sale and the copy of it delivered to the respondents were not in authentic form.

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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The five judges of the Court of King's Bench were of opinion that notice of the fire and sworn proofs of loss had been duly delivered to the insurance company. Their judgment turned upon one point, namely, whether the transfer of the Eaton Company's claim against the insurance company had been properly signified to the insurance company before the institution of the action by the bank; and the judges were divided upon this question, three against two: Lacoste C.J. and Bossé and Blanchet JJ. being for confirming the dispositif or conclusion of the judgment in the Superior Court, and Hall and Wurtële JJ. dissenting therefrom, holding that the provisions of the law in respect of acquiring rights against third parties had been complied with.

Thus the point upon which they differed was whether the bank had become the respondents' creditor by reason of the transfer made to it by the assured. As between the Eaton Company and the bank there was a valid transfer. "But," said Bossé J., "does the writing effecting this transfer, valid between the assured and the bank, constitute the bank the creditor for the sum transferred without signification? and how ought this signification to be made in order to operate seizin and substitution of one creditor for another? These are the sole questions on the subject about which there is difference of opinion. The majority of the Court believes that there has not been signification of the transfer according to the terms of our Code, and consequently no seizin of the debt."

The reasons of Lacoste C.J. were—(1.) that the copy of the transfer was une copie informe; and (2.) that the notification was not made by an officier ministériel. He held that an action cannot be brought before signification.

Wurtële J. pointed out that "signification" is a synonym for "notification"; that in France signification is made by a bailiff, whose acts in this respect are authentic; that the bailiff has no such function in this country; and that, though a notary may make signification of transfer, he has not the exclusive power so to do. He thus defines "signification": "The essence of a signification is, therefore, the making known to a third party the existence of a legal fact, and, in the case

of the transfer of a debt, the signification is the service on the debtor of a notice mentioning and describing such transfer, together with the delivery to him of a copy of the transfer. When notice is given, and when at the time of the service of the notice a copy of the transfer is delivered to the debtor, the signification, in my opinion, is made in a legal and official form, no matter by whom the service has been effected, as the law prescribes nothing in that respect." He further observed: "In the absence of an express enactment requiring the signification of a transfer to be made by a notarial act, such significations fall under the ordinary rule of law, which only requires deeds of gift inter vivos, contracts of marriage, and deeds conferring hypothecs, to be executed in notarial form, and allows all other acts to be executed by private writings; signification may, consequently, be made by a private writing, and under the provisions of art. 1225 of the Civil Code their date may be established against third persons in the several ways which it indicates." Commenting upon the statute 38 Vict. (Quebec) c. 26, in regard to the transfer of seignorial dues, embodied in the Revised Statutes of Quebec, he observed: "The last-mentioned statute also enacts that the signification of a transfer of seignorial dues is to be made by a notary; but the enactment is special and for a special and particular case, and establishes an exception to the general rule, which does not require by any text of law a notarial signification. If the rule of law required in all cases of the transfer of debts a notarial signification, this special enactment would not have been required; and its enactment confirms the general rule." He also observed that in this case "no third party has set up any claim to the amount of the insurance, either by transfer or by attachment, and that the respondent was fully protected against the possibility of other claimants. The insurance is payable at the company's office in Montreal, and before handing over the money it had the right, not only to ask for a proper release, but also to exact the surrender of the policy and due exhibition of the original transfer. The payment, therefore, could have been made with perfect safety, and whether the copy served was authentic and certified or not is consequently

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immaterial. All the company respondent had to do was to notify the bank appellant, and the latter had to go to the company respondent's office and to produce all the necessary documents to prove its right and be the basis of a valid release."

Russell, K.C., Riddell, K.C., and *Geoffrion*, for the appellants, contended that the signification of the act of sale had been duly made, and that the bank had been duly constituted a creditor of the respondent. They referred to arts. 1570 and 1571 of the Civil Code, and to R. S. Q. (1888) vol. ii. s. 5814, 1571 (*a*), and schedule thereto. Special and exceptional provision is made in the Revised Statutes for the assignment and transfer of constituted rents, replacing seignorial dues: see arts. 5610, 5612; shewing that by the ordinary rule signification could be made otherwise than by a notary, whose interposition had to be specially authorized or required. Reference was also made to arts. 1207, 1209, and 1225 of the Civil Code, which give the meaning of authentic. For the purposes of this case authentic means notarial. Certain letters written to the respondent by the bank's solicitors, and the delivery of the act of sale to the respondent, with a formal intimation from the solicitors that it was a copy, with the offer of an inspection of the original, were relied upon as satisfying all the requirements of the Code in respect both of signification and delivery. Signification is nothing more than notice, and there is no legal objection to its being made in writing under private signature at the instance of the purchaser; otherwise the service of the action was a valid signification of the act of sale, of which a copy had been previously delivered. The Code was exhaustive on this subject, and its rules could not be controlled by any pre-existing law: see *Abbott* v. *Fraser* (1); *Citizens' Insurance Company of Canada* v. *Parsons*. (2) In France, no doubt, acceptance by the debtor must be in authentic form, and in this and other respects its law differs from that of Quebec: see art. 1690 of the French Code. See Aubry and Rau, "Obligations," vol. iv. p. 434, on art. 1690, also note 12 on p. 429,

(1) (1874) L. R. 6 P. C. 96. (2) (1881) 7 App. Cas. 96.

note 38 on p. 434, and pp. 428, 429. Dalloz, 1888, pt. 2, p. 63. In *Murphy* v. *Bury* (1) it was no doubt decided that signification is a condition precedent to the right of action by a purchaser against a debtor. But see *Aylwin* v. *Judah* (2); *Martin* v. *Côté* (3); *Pare* v. *Derousselle* (4); *Lamothe* v. *Fontaine* (5); *Quinn* v. *Atcheson* (6); *Prowse* v. *Nicholson* (7); *Moody* v. *Jones* (8); *M'Corkill* v. *Barrabé*. (9)

Blake, K.C., and *Beaudin, K.C.*, for the respondents, contended that the appellants could not recover, since they had not proved due signification of the transfer of the policy sued upon to them, or due delivery of a properly authenticated copy thereof to the respondents before action brought. Signification and delivery were conditions precedent to the vesting in the appellants of any right or interest in the said policy. And it may be contended that assignment without notice and consent by, and therefore concealment from the respondents, avoided the policy: see Civil Code, arts. 2576, 2485, and 2487. At all events, art. 1571 was not complied with. That article was merely the re-enactment of art. 108 of the Coutume de Paris, and is only declaratory of the law before the Code. See also art. 1690 of the Code Napoléon. Art. 1571 should receive the same construction as the old art. 108. It was contended that both on the language of the text and the conclusions of the commentators (whatever may be the effect of a transfer as between creditor and transferee) the signification of transfer as well as due delivery of an authenticated copy was essential to the validity of the transfer as against the debtor. And it is quite immaterial whether the debtor is otherwise aware of the fact of transfer. The signification can only be made by a ministerial officer, whose certificate is authentic as to the fact and as to the time of service. See Pothier, vo. "Vente," Nos. 554, 555, 556, and 557; 24 Laurent, No. 485; Troplong, de la vente, vol. ii. No. 882, 883; Rolland de Villargues, vol. vi. vo. "Notification"; 4 Denisart, vo. "Signification";

(1) 24 Can. S. C. 668.
(2) (1864) 9 L. C. J. 179.
(3) (1851) 1 L. C. R. 239.
(4) (1850) 6 L. C. R. 411.
(5) (1857) 7 L. C. R. 49, 51.
(6) (1854) 4 L. C. R. 378.
(7) (1885) 17 Revue Légale, 284.
(8) Mont. L. R. 6 Q. B. 354.
(9) (1885) Mont. L. R. 1 S. C. 319.

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40 Dalloz, p. 347; Guillouard, vol. ii. p. 310, No. 773; Sirey, 1895, 4th vol. p. 13; Ct. of Cassation, 7 Nov. 1894. See also Civil Code as to notice, arts. 1208, 1209. The general result of the authorities is that signification has a special meaning—it must be a notarial act. Reference was also made to *Curling* v. *Ross* (1); *Murphy* v. *Bury*. (2)

Geoffrion, replied.

1902 Nov. 19.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The John Eaton Company, Limited, were the owners of a large dry goods store in the city of Toronto. Their stock was insured in a number of offices, and among others in the office of the St. Lawrence Fire Insurance Company of Montreal to the amount of $2500.

On May 20, 1897, the store with its contents was entirely destroyed by fire. The value of the goods burnt exceeded the aggregate amount of the insurances upon them.

It is not disputed now that the respondent company would have been liable for the sum intended to be secured by the policy effected in their office, if the interest in that policy had remained vested in the John Eaton Company.

It appears, however, that the John Eaton Company were under large advances to the Bank of Toronto, and that they had given the bank an undertaking that in the event of their goods being damaged by fire they would hold the policy moneys in trust for the bank, and would, if required, assign all the policies to them.

On May 22, 1897, two days after the fire, the John Eaton Company assigned to the bank their interest in all the insurances on their stock, including the moneys payable under the policy effected with the St. Lawrence Company.

Notice of the assignment was given to the several offices concerned, and due proof of loss was furnished. The respondent company was requested to concur with the other offices in the adjustment of the claim. The solicitors of the bank wrote several letters to the respondent company and pressed for an answer to their applications, or at least for an acknowledgment

(1) 20 Revue Légale, 346. (2) 24 Can. S. C. 676.

of their communications. The respondent company, however, systematically disregarded all communications, whether oral or written, and did not answer or acknowledge a single letter written to them on behalf of the bank—a course of conduct so little in keeping with the usages of business men that one of the learned judges in the Court of King's Bench, whose view of the facts is accepted as correct by all his colleagues, did not hesitate to describe it as being "to say the least rather devious."

By the terms of the policy all claims under it were to be barred at the expiration of six months. So in November, 1897, when the period was just running out, the bank served the respondent company with a formal notice of the assignment, and at the same time furnished them with a copy of the assignment itself. Later on the same day this action was brought.

The respondent company set up several defences, of which one and one only was seriously argued at the bar.

It was strenuously contended, and the contention had already found favour with the Superior Court and a majority of the Court of King's Bench, that the action must fail because the bank had not duly made "signification" as required by the Civil Code "of the act of sale" which gave rise to their claim. It was not disputed that there had been a transfer of the debt, that notice of the transfer had been given to the respondent company, and that a document which purported to be and was in fact a copy of the transfer had been furnished to them. But they maintained that "signification" must be made by a notary, and that the copy ought to have been authenticated or certified, and that for want of these formalities the notification of the transfer was without legal effect. On this point their Lordships have had the advantage of considering the reasons given by Wurtële J. for dissenting from the majority of the Court. His judgment, in which Hall J. concurred, seems to their Lordships to be a careful and accurate exposition of the law, and their Lordships are satisfied to adopt it as the basis of their judgment. It will, therefore, not be necessary for them to do more than state very briefly the grounds on which they think the decision under appeal ought to be reversed.

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It appears to their Lordships that the question must depend simply upon the provisions of the Civil Code, without introducing or importing any requirements which, though necessary under the custom of Paris or under modern French law, are not found in the Code as it stands. Now, the provisions of the Code as regards the sale of debts are contained in arts. 1570 and 1571. Article 1570 provides that "the sale of debts . . . . is perfected between the seller and the buyer by the completion of the title if authentic, or the delivery of it if under private signature." Then art. 1571 declares that "the buyer has no possession available against third persons until signification of the act of sale has been made and a copy of it delivered to the debtor," except in case the transfer is accepted by the debtor himself, as mentioned in art. 1571.

There is nothing in the Civil Code to shew that the intervention of a notary is required. It is certainly not prescribed in terms, nor is there in their Lordships' opinion any room for implication in this matter.

The view of Wurtele J., in which their Lordships concur, is confirmed by the provisions of art. 1571A, added by the Revised Statutes of Quebec (1888), which explains how "the signification of the sale required by art. 1571" may be effected whenever "the debtor has left or never had his domicil in the province." It receives further confirmation from the exceptional provisions made in the Revised Statutes "for the assignment and transfer of consolidated rents replacing seignorial dues." Those provisions which are embodied in art. 5610 do require "a notarial act in authentic form." Apparently this requirement would have been unnecessary if a notarial act had been the universal rule.

Their Lordships do not stop to inquire whether the debtor is a "third person" within the meaning of art. 1571, as seems to have been assumed in the Courts below, and is stated expressly by Sir A. Lacoste C.J. The question is not material in the present case. It appears, however, to their Lordships that if the point should hereafter arise it would require further consideration.

There is one point which their Lordships cannot leave

unnoticed. Some of the learned judges who have taken part in this case express a strong opinion that it is not competent for the assignee of a debt to bring an action for the purpose of enforcing his claim against the debtor until "signification" of the act of sale has been made and a copy of it delivered to the debtor. This view is in accordance with a recent ruling of the Supreme Court (*Murphy* v. *Bury* (1)), though until that decision was pronounced the general opinion seems to have been the other way. (See *Aylwin* v. *Judah* (2); *Martin* v. *Côté* (3); *Quinn* v. *Atcheson*. (4)) It appears to their Lordships that the institution of an action against the debtor to recover the debt is of itself a sufficient signification of the act of sale, and their Lordships agree with Wurtële J. in thinking that there is nothing in the Code which requires the signification of the act of sale and the delivery of a copy of it to the debtor to be made at one and the same time.

For these reasons their Lordships are of opinion that the judgment under appeal must be reversed, and that an order should be pronounced condemning the respondent company to pay to the bank the amount secured by the policy in question, with interest and costs in the Superior Court and the Court of King's Bench.

Their Lordships will humbly advise His Majesty accordingly.

The respondent company will pay the costs of the appeal.

Solicitors for appellants: *Charles Russell & Co.*

Solicitor for respondents: *S. V. Blake.*

(1) 24 Can. S. C. 668.
(2) 9 L. C. J. 179.
(3) 1 L. C. R. 239.
(4) 4 L. C. R. 378.

[PRIVY COUNCIL.]

J. C.* 1902 July 4, 7; Nov. 19.

LAMBE AND ANOTHER . . . . . PLAINTIFFS;

AND

MANUEL AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Quebec Succession Duty Act, 1892—*Construction—Quebec Taxes apply to Quebec Successions.*

Held, that taxes imposed on movable property by the Quebec Succession Duty Act of 1892 and the amending Acts apply only to property which the successor claims under or by virtue of Quebec law; and have no application to the several items in this case, which formed part of a succession devolving under the law of Ontario.

APPEAL from a decree of the above Court (March 1, 1901) affirming a decree of the Superior Court (June 29, 1900) and dismissing the appellants' action.

The appellant Lambe brought the action under the Quebec Act, 55 & 56 Vict. c. 17, as amended by 57 Vict. c. 16 and 58 Vict. c. 16, commonly called the "Succession Duty Act," and claimed penalties as well as taxes. In the course of the proceedings the Attorney-General intervened as representing the Crown and interested therein.

A retraxit was filed for both parties as to penalties, and the action was thereafter prosecuted for the taxes alone.

The respondent Manuel was sued as the executor and also the universal residuary legatee under the will of Allen Gilmour, deceased; and the Merchants' Bank of Canada, the Canadian Bank of Commerce, and David Law were joined as mis-en-cause, the former as banks on certain shares in which taxes were claimed, and the other as the mortgagor of certain lands, in respect of which mortgage also taxes were claimed.

The nature of the property and the applicable sections are set out in the judgment of their Lordships.

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

The appellants claimed that the property described is property situate in the province of Quebec, and also transferable and recoverable therein, and that the tax of 10 per cent. on its value, laid by the statute, is exigible by the Crown as represented in the province.

The essence of the defence, which was upheld by both Courts, to the action was that, on the true construction of s. 1191 B of the Act of 1894, the property, being movable, was not "in the province of Quebec," but in the province of Ontario, the testator's domicil; and that therefore the tax is not exigible.

Blake, K.C., and *Duffy, K.C.*, for the appellants, contended that the Crown was entitled to the taxes as claimed. The property in question was at the testator's death in the province of Quebec under the definition of the clause laying the tax, namely, s. 1191 B. The shares in question in the Merchants' Bank stock had their situs within the province of Quebec, where the head office of the bank was situated, where they were transferable, and in whose Courts they were recoverable. The same conditions applied to the shares in the Canadian Bank of Commerce by virtue of their being in the Montreal register and transfer books. The immovable property comprised in Law's mortgage being within the same province, and the debtor being therein domiciled, and the asset being recoverable and transferable therein, it had also its situs within the province. Reference was made to *Blackwood* v. *Reg.* (1); *Harding* v. *Commissioners of Stamps* (2); *Hodge* v. *Reg.* (3); and see arts. 599, 600, and 6 of the Civil Code.

Haldane, K.C., *Fleet*, and *Manuel*, for the respondent Manuel, contended the Crown was not entitled to the taxes as claimed. The testator was not domiciled in Quebec but in Ontario, where he had been domiciled at and long before his death, which occurred in Ottawa. The assets referred to on the other side were all of them personalty referable by law to the law of his domicil under the rule "Mobilia personam

(1) (1882) 8 App. Cas. 82, 91. (2) [1898] A. C. 769.
(3) (1883) 9 App. Cas. 117.

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sequuntur." By his death the testator's succession devolved by the laws of Ontario. The Act cannot deal with his succession as a whole, or with that part of it which is outside the jurisdiction of the Quebec legislature. The machinery provided by the Act for its working and the collection of the succession duty does not apply to the successions of persons dying or domiciled beyond the province of Quebec. The taxes in this case are in terms imposed on the transmission of property owing to death in the province of Quebec, and in this case no property has been so transmitted. No tax was imposed on successions of personalty where neither the testator nor the beneficiary were ever domiciled in the province of Quebec. Reference was made to *Harding's Case* (1); *Thomson* v. *Advocate-General* (2); *Wallace* v. *Attorney-General* (3); *Colquhoun* v. *Brooks*. (4)

Blake, K.C., replied.

1902 Nov. 19.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This action, in which the Attorney-General for the province of Quebec has intervened, was brought by the collector of provincial revenue for the district of Montreal against the respondent John Manuel, sole acting executor and universal residuary legatee under the will of the late Allan Gilmour, a gentleman of considerable property who had his domicil in the province of Ontario. The object of the action was to recover succession taxes claimed to be due under the Quebec Succession Duty Act of 1892 and the Acts amending the same in respect of certain parts of the testator's estate as being "movable property . . . . in the province."

The items in respect of which succession taxes were claimed are the following:—

1. Shares standing in the testator's name in the capital stock of the Merchants' Bank of Canada. The head office of the bank is in the city of Montreal, where its stock register and transfer books are kept.

(1) [1898] A. C. 769.
(2) (1845) 12 Cl. & F. 1.
(3) (1865) L. R. 1 Ch. 1.
(4) (1889) 14 App. Cas. 493.

2. Shares in the capital stock of the Canadian Bank of Commerce. The head office of that bank is in the city of Toronto. It has, however, a branch in Montreal, with a separate stock register and transfer books, in which transfers are entered and recorded, so that a certain portion of the capital of the bank is represented by shares registered and transferable in Toronto, and the remainder by shares registered and transferable in Montreal. On the application of the owner transfers are made from one register to the other. The testator's shares were at the time of his death standing in his name in the Montreal register.

3. A mortgage debt secured by hypothec on land in Montreal.

The taxes were claimed under the following provisions of the Quebec Succession Duty Acts:—

1191 B: "All transmissions, owing to death, of the property in, usufruct, or enjoyment of, movable and immovable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted after deducting debts and charges existing at the time of the death.

* * * * * *

"3. If the succession devolves to a stranger, 10 per cent."

1191 D, sub-s. 5: "No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid; and no executor trustee administrator curator heir or legatee shall consent to any transfers or payments of legacies unless the said duties have been paid."

The Superior Court unanimously rejected the plaintiff's claim, and the decision of that Court was unanimously affirmed by the Court of King's Bench.

The reasons of the learned judges were delivered by Sir Melbourne M. Tait, Acting Chief Justice, in the Superior Court, and by Bossé J. in the Court of King's Bench.

Those reasons, stated shortly, are that according to their true construction the Quebec Succession Duty Acts only apply in the case of movables to transmissions of property resulting from the devolution of a succession in the province of Quebec,

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or, in other words, that the taxes imposed by those Acts on movable property are imposed only on property which the successor claims under or by virtue of Quebec law, and that in the present case the several items in respect of which succession taxes are claimed form part of a succession devolving under the law of Ontario.

The decisions of the Quebec Courts are, in their Lordships' opinion, entirely in consonance with well-established principles, which have been recognised in England in the well-known cases of *Thomson* v. *Advocate-General* (1) and *Wallace* v. *Attorney-General* (2), and by this Board in the case of *Harding* v. *Commissioners of Stamps for Queensland.* (3)

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellants will pay the costs of the respondent Manuel, who alone defended this appeal.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondent Manuel: *Simpson & Co.*

(1) 12 Cl. & F. 1. (2) L. R. 1 Ch. 1.
(3) [1898] A. C. 769.

[PRIVY COUNCIL.]

ONTARIO MINING COMPANY, LIMITED PLAINTIFFS.
AND ATTORNEY-GENERAL FOR CANADA
(INTERVENING)

AND

SEYBOLD AND OTHERS . . . . . DEFENDANTS.
AND ATTORNEY-GENERAL FOR ONTARIO
(INTERVENING).

J. C.*
1902
July 7, 8;
Nov. 12

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *s.* 91—*Lands in Ontario surrendered by the Indians—Proprietary Right—Power of Disposition.*

Lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the Ministers of the province and under the seal of the province.

St. Catherine's Milling Co. v. *Reg.*, (1888) 14 App. Cas. 46, followed.

The Dominion Government having purported, without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty:—

Held, that this was ultra vires the Dominion, which had by s. 91 of the British North America Act of 1867 exclusive legislative authority over the lands in question, but had no proprietary rights therein.

The consent of the province having been subsequently provided for by a statutory agreement between the two Governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had been made.

APPEAL by special leave from a judgment of the Supreme Court (June 5, 1901) affirming a judgment of the Divisional Court of Ontario which had affirmed a judgment of the Chancellor of Ontario, who had dismissed the appellants' suit with costs.

The appellants, on February 15, 1899, brought their action in the High Court of Justice for Ontario to have it declared

* *Present*: THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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that, by virtue of certain letters patent issued by the Crown, as represented by the Government of the Dominion of Canada, to the plaintiffs' predecessors in title, the plaintiffs were the owners in fee simple of certain lands situate on Sultana Island, in the Lake of the Woods, in the province of Ontario, containing 110$\frac{3}{4}$ acres, more or less, including the minerals, precious and base, therein; and that certain other letters patent subsequently issued by the Crown, as represented by the Government of the province of Ontario, comprising, inter alia, the same lands, were void, and were clouds upon the title of the plaintiffs, and should be ordered to be set aside and cancelled.

The respondent Johnston counter-claimed for a declaration that the appellants' patents were void.

The Chancellor of Ontario, under the circumstances, which were not disputed and are stated in their Lordships' judgment, dismissed the action and gave judgment on the counter-claim, declaring the appellants' patents to be void. His judgment, which was substantially affirmed by both the Appellate Courts, proceeded on the grounds that whilst over the Reserve 38 B (which included the lands in suit) the Dominion had legislative and administrative jurisdiction, the territorial and proprietary rights to the soil were vested in the Crown for the benefit of and subject to the legislative control of the province of Ontario; that by the surrender of 1886 the Indian title was extinguished for the benefit of the province, and that no estate could pass to the fee simple of the lands except from the Crown, as represented by the Ontario Government.

The Chief Justice (Sir Henry Strong), besides agreeing with the Chancellor, based his decision more particularly on the reasons given by the Judicial Committee in *St. Catherine's Milling Co.* v. *Reg.* (1)

The judgment of Gwynne J., which was in favour of the appellants, was based upon the following grounds:—

"(*a*) That the British North America Act excluded all idea of any right of interference, direct or indirect, being possessed by or vested in the legislatures or governments of any of the provinces of the Dominion in relation to the Indians or their

(1) 14 App. Cas. 46.

title to lands reserved for their benefit in any part of the Dominion;

"(*b*) That the British North America Act maintains the distinction between 'lands belonging to the several provinces' and 'Indian lands,' and preserved and maintained the Indians in the enjoyment of the benefit and conditions of all treaties entered into between them and the Sovereign;

"(*c*) That the reserves in this case must be regarded as lands vested in the Crown in trust for the sole use and benefit of the Indians upon the terms and conditions agreed upon as those upon which the trust was accepted by Her late Majesty;

"(*d*) That the provisions of the Indian Acts clearly shew the title of the Indians to lands reserved and the precious metals thereunder to be real and substantial and not illusory;

"(*e*) That unless the Proclamation of 1763 and the treaties made thereunder are a dead letter, and the provisions of the British North America Act relating to Indian lands are illusory and devoid of all significance, the sale by the Crown of their reserves, or such parts thereof as should be surrendered to the Crown upon trust to be sold for their benefit, are within the exclusive legislative authority of the Dominion Parliament;

"(*f*) That the lands in question are in a totally different position from the lands under consideration in the *St. Catherine's Milling Co.'s Case* (1);

"(*g*) That the letters patent to the appellants are therefore valid, and the letters patent under which the respondents claim are null and void in so far as they purport to affect the appellants' title to the land and minerals claimed by them."

Bicknell, K.C., and *Greer*, for the appellants, contended that judgment should be entered for them in terms of their claim. They relied upon the grounds taken by Gwynne J. By the British North America Act, 1867, in order to ensure uniformity of administration, the British Parliament placed all lands held in trust for Indians and Indian affairs under the legislative control of the Dominion: see s. 91, sub-s. 24. It would be

(1) 14 App. Cas. 46.

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subversive of the policy of that Act to allow any interference by the provincial governments with Indian lands or Indian affairs. Sect. 109, which vests in the several provinces the lands situated therein, does so subject (1.) to any trust in respect thereof; (2.) to any interest other than that of the province. It was contended that the trusts then existing in respect of Indian reserves, theretofore set apart by treaty, were continued. *St. Catherine's Milling Co.* v. *Reg.* (1) decides that the title in unsurrendered lands held by the Indians under the Proclamation of 1763 is "an interest other than that of the province" under this section. The consideration for the extinction of that interest in a very large tract of territory was the setting apart thereout of Indian reserves of 365,225 acres, which accordingly are to be dealt with by the Crown in the same way as the reserves held in trust in 1867. This case is not governed by *St. Catherine's Milling Co.* v. *Reg.* (1), for the lands in that case were of an entirely different nature. In them the Indian title had been extinguished for the public uses of the province. The lands now in suit are lands held by the Crown in trust to sell and dispose of them for the benefit of the Indians; and consequently there is no beneficial interest in them in the province of Ontario. What is called the surrender of these lands to the Crown is in reality a consent by the Indians, as required by the treaty, to the sale thereof by the Crown. It did not, and was not intended to, extinguish their title, but to consent to its conversion into money for their benefit. The reserves selected under the treaty never were lands belonging to the province within the meaning of s. 109. They belonged to the Crown, and neither to the Dominion nor to the province. They can only be disposed of by such statutory authority as is applicable to them. That statutory authority is vested in the Dominion, and the appellants have acquired title by virtue of Dominion legislation: see Consolidated Statutes of Canada, 1859, c. 9, ss. 10 to 18; and after 1867, 31 Vict. c. 42, 32 & 33 Vict. c. 6, 39 Vict. c. 18, and 43 Vict. c. 28; Revised Statutes of Canada, 1886, c. 43. Besides, the province of Ontario must be deemed to have acquiesced in

(1) 14 App. Cas. 46.

the selection of reserves by the officers of the Dominion Government, and did not before the dealing with Reserve 38 B express any dissatisfaction therewith.

Newcombe, K.C., and *Loehnis*, for the Attorney-General of the Dominion, contended that the letters patent under which the appellants claimed were issued by the Dominion pursuant to British North America Act, 1867, s. 91, sub-s. 24, and Revised Statutes of Canada, c. 43, s. 41. The title to the reserve in this case is vested in the Crown as representing the Dominion; if not, it has in its own right the power of sale and disposition over them, under a trust arising from the surrender in 1886. That surrender did not confer a like power on the province. Ontario has the benefit of the surrender, and cannot object to the execution of the stipulations made in favour of the Indians. Nor is her authority or consent necessary to the conversion of an Indian reserve into money for the benefit of the Indians.

Blake, K.C., for the Attorney-General of Ontario, contended that there was no question of general public importance affecting Ontario warranting the application for leave to appeal, and that accordingly the appeal should be dismissed on that ground alone. After the decision in *St. Catherine's Milling Co.* v. *Reg.* (1) Canada was advised that she had no right to create a reserve of the land in question, and that patents issued by her were void. She thereupon entered into negotiations with Ontario, which resulted in a statutory agreement under 54 & 55 Vict. (Canada) c. 5 and 54 Vict. (Ontario) c. 3, which is in force, though delays have occurred in its execution. The intention is to fulfil it, and it had before suit finally disposed of the question now raised.

J. M. Clark, K.C., for the respondents.

Newcombe, K.C., replied.

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The judgment of their Lordships was delivered by—

LORD DAVEY. In this case leave was given by His Majesty in Council, on the advice of this Board, to appeal against a judgment of the Supreme Court of Canada dated June 5, 1901. In their petition for leave to appeal the appellants, the Ontario

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Mining Company, alleged that the title to 365,225 acres of land, purporting to have been set aside by the Dominion Government as reserves for the Indians, was affected by the judgment, and represented that the question involved was one of great constitutional and general importance, affecting not only the Dominion and Provincial Governments, but also all the Indians in the province of Ontario. By the Order in Council giving the appellants leave to appeal it was ordered that the Government of the Dominion of Canada and the Government of the province of Ontario should be at liberty to intervene in the appeal, or to argue the same upon a special case raising the legal question or questions in dispute. The two Governments have availed themselves of this liberty, and were represented by counsel on the hearing of the appeal. A preliminary objection was taken to the appeal being heard on its merits by counsel for the respondents, and also by counsel for the Ontario Government, on the ground that the petition for leave to appeal did not disclose an agreement made between the Governments of the Dominion and of Ontario and confirmed by their two Legislatures respectively, which, it was said, if disclosed, would have shewn that the question between the parties to the litigation did not, as alleged, affect the title to the large tract of land mentioned, and that in existing circumstances there was not any question of constitutional or general importance involved affecting either the Governments or the Indians. Their Lordships will postpone for the present their consideration of this objection.

The dispute is between rival claimants under grants from the Governments of the Dominion and of Ontario respectively. The appellants claim to be entitled to certain lands situate on Sultana Island, in the Lake of the Woods, within the province of Ontario, and the minerals thereunder, under letters patent, dated March 29, 1889, April 30, 1889, September 2, 1889, and July 23, 1890, issued by the Government of the Dominion to their predecessors in title. The respondents claim an undivided two-thirds interest in the same lands and minerals under letters patent issued to them by the Government of Ontario, and dated January 16, 1899, and January 24, 1899. The action

was brought by the appellants against the respondents in the High Court of Justice of Ontario, and their claim was to have the letters patent of Ontario, under which the respondents claimed, declared void and set aside and cancelled, and for consequential relief. One of the respondents, on the other hand, counter-claimed for similar relief respecting the letters patent of the Dominion under which the appellants claimed title.

The lands in question are comprised in the territory within the province of Ontario, which was surrendered by the Indians by the treaty of October 3, 1873, known as the North-West Angle Treaty. It was decided by this Board in the *St. Catherine's Milling Co.'s Case* (1) that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of s. 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty. In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the British North America Act, 1867, "it must always be kept in view that wherever public lands with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

After the making of the treaty of 1873, the Dominion Government, in intended pursuance of its terms, purported to

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set out and appropriate portions of the lands surrendered as reserves for the use of the Indians, and among such reserves was one known as Reserve 38 B, of which the lands now in question form a part. The Rat Portage band of the Salteaux tribe of Indians resided on this reserve.

On October 8, 1886, the Rat Portage band surrendered a portion of Reserve 38 B, comprising the land in question, to the Crown, in trust to sell the same and invest the proceeds and pay the interest from such investment to the Indians and their descendants for ever. This surrender was made in accordance with the provisions of a Dominion Act known as the Indian Act, 1880. But it was not suggested that this Act purports, either expressly or by implication, to authorize the Dominion Government to dispose of the public lands of Ontario without the consent of the Provincial Government. No question as to its being within the legislative jurisdiction of the Dominion therefore arises.

The action was tried before the Chancellor of Ontario, and by his judgment of December 2, 1899, it was dismissed with costs. By a second judgment of December 22, 1899, on the counter-claim it was declared that the several patents under the Great Seal of Canada, under which the appellants claimed, were ultra vires of the Dominion and null and void as against the respondents. On appeal to the Divisional Court these judgments were affirmed.

The reasons of the learned Chancellor for his decision are thus summarized in his judgment.

"Over the Reserve 38 B the Dominion had and might exercise legislative and administrative jurisdiction, while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the province of Ontario. The treaty land was, in this case, set apart out of the surrendered territory by the Dominion—that is to say, the Indian title being extinguished for the benefit of the province, the Dominion assumed to take of the provincial land to establish a treaty reserve for the Indians. Granted that this might be done, yet when the subsequent surrender of part of this treaty reserve was made

in 1886 the effect was again to free the part in litigation from the special treaty privileges of the band, and to leave the sole proprietary and present ownership in the Crown as representing the province of Ontario. That is the situation so far as the title to the land is concerned."

The learned judge expressed his opinion that it was not proved that the Provincial Government had concurred in the choice or appropriation of the reserves, though in the view which he took of the case he considered it immaterial.

In the Divisional Court Street J. expressed himself as follows :—

"The surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it; but it is equally plain that its ownership of the tract of land covered by the treaty was so complete as to exclude the Government of the Dominion from exercising any power or authority over it. The act of the Dominion officers, therefore, in purporting to select and set aside out of it certain parts as special reserves for Indians entitled under the treaty, and the act of the Dominion Government afterwards in founding a right to sell these so-called reserves upon the previous acts of their officers, both appear to stand upon no legal foundation whatever. The Dominion Government, in fact, in selling the land in question, was not selling 'lands reserved for Indians,' but was selling lands belonging to the province of Ontario."

The Chief Justice adopted the reasons of the learned Chancellor.

There was a second appeal to the Supreme Court. The majority of the learned judges in that Court held that the case was governed by the decision of this Board in *St. Catherine's Milling Co.* v. *Reg.* (1), and the appeal was dismissed. Gwynne J. dissented, but the reasons for his opinion given by

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that learned and lamented judge seem to be directed rather to shew that the decision of this Board in the previous case was erroneous.

Their Lordships agree with the Courts below that the decision of this case is a corollary from that of the *St. Catharine's Milling Co.* v. *Reg.* (1) The argument of the learned counsel for the appellants at their Lordships' bar was that at the date of the letters patent issued by the Dominion officers to their predecessors in title the land in question was held in trust for sale for the exclusive benefit of the Indians, and therefore there was no beneficial interest in the lands left in the province of Ontario. This argument assumes that the Reserve 38 B was rightly set out and appropriated by the Dominion officers as against the Government of Ontario, and ignores the effect of the surrender of 1873 as declared in the previous decision of this Board. By s. 91 of the British North America Act, 1867, the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for the Indians." But this did not vest in the Government of the Dominion any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province. Their Lordships repeat for the purposes of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the *Fisheries Case* (2) as to the broad distinction between proprietary rights and legislative jurisdiction. Let it be assumed that the Government of the province, taking advantage of the surrender of 1873, came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could

(1) 14 App. Cas. 46.

(2) *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, &c.*, [1898] A. C. 700.

only be effectively made by the joint action of the two Governments.

It is unnecessary to say more on this point, for as between the two Governments the question has been set at rest by an agreement incorporated in two identical Acts of the Parliament of Canada (54 & 55 Vict. c. 5) and the Legislature of Ontario (54 Vict. c. 3), and subsequently signed (April 16, 1894) by the proper officers of the two Governments. In this statutory agreement it is recited that since the treaty of 1873 the true boundaries of Ontario had been ascertained and declared to include part of the territory surrendered by the treaty, and that, before the true boundaries had been ascertained, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the treaty, and that the Government of Ontario was no party to the selection, and had not yet concurred therein; and it is agreed by art. 1 (amongst other things) that the concurrence of the province of Ontario is required in the selection. By subsequent articles provision is made, "in order to avoid dissatisfaction or discontent among the Indians," for full inquiry being made by the Government of Ontario as to the reserves, and in case of dissatisfaction by the last-named Government with any of the reserves already selected, or in case of the selection of other reserves, for the appointment of a joint Commission to settle and determine all questions relating thereto.

The learned counsel of the appellants, however, says truly that his clients' titles are prior in date to this agreement, and that they are not bound by the admissions made therein by the Dominion Government. Assuming this to be so, their Lordships have already expressed their opinion that the view of their relative situation in this matter taken by the two Governments was the correct view. But it was contended in the Courts below, and at their Lordships' bar was suggested rather than seriously argued, that the Ontario Government, by the acts and conduct of their officers, had in fact assented to and concurred in the selection of, at any rate, Reserve 38 B, notwithstanding the recital to the contrary in the agreement. The evidence of the circumstances relied on for this purpose

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was read to their Lordships; but on this point they adopt the opinion expressed by the learned Chancellor Boyd that the province cannot be bound by alleged acts of acquiescence on the part of various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any Order in Council or other authentic testimony. They, therefore, agree with the concurrent finding in the Courts below that no such assent as alleged had been proved.

It is unnecessary for their Lordships, taking the view of the rights of the two Governments which has been expressed, to discuss the effect of the second surrender of 1886. Their Lordships do not, however, dissent from the opinion expressed by the Chancellor of Ontario on that question.

To revert now to the preliminary objection, their Lordships do not desire to impute any want of good faith to the advisers of the appellants. They may have thought that their clients were not bound by the statutory agreement, and that it was not, therefore, necessary to mention it in their petition for leave to appeal. But the omission to do so was a grave and reprehensible error of judgment, for the existence of the agreement supplies an answer to the allegation of the general public importance of the questions involved, upon which the petition for leave to appeal was founded, as regards both the two Governments and the Indians. If the objection had been taken in a petition to rescind the leave granted, it would probably have succeeded, and their Lordships would now be amply justified in refusing to hear the appeal on its merits. But it was necessary to hear the argument in order to appreciate the objection; and the appeal has had this advantage, that it has enabled Mr. Blake, as counsel for Ontario, to state that he and the learned counsel for the Dominion, acting under authority from their respective Governments, have arranged terms for their adoption which will, it is hoped, have the effect of finally settling in a statesmanlike manner all questions between the Governments relating to the reserves.

Their Lordships will humbly advise his Majesty that the

appeal should be dismissed. The appellants will pay the respondents' costs of it; but the interveners will neither pay nor receive costs.

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Solicitors for appellants: *Harrison & Powell.*
Solicitor for respondents: *S. V. Blake.*
Solicitors for Dominion of Canada: *Charles Russell & Co.*
Solicitor for province of Ontario: *S. V. Blake.*

[PRIVY COUNCIL.]

KIEFFER . . . . . PLAINTIFF;

AND

LE SÉMINAIRE DE QUÉBEC . . . . DEFENDANTS.

J. C.* 1902 *July* 21, 23; *Nov.* 12.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC.

CONSOLIDATED APPEAL AND CROSS-APPEAL.

Law of Lower Canada—Action négatoire against Proprietor—Liability of Lessee to adjoining Proprietor in respect of Works on his Land—Damages.

Where a lessee of defendants' land, being in possession thereof and having a contract for future purchase contained in his lease, raised for the purpose of building operations for his own benefit, and not as mandatory of the defendants, the lower part of the leased land with the effect of diverting to the plaintiff's adjoining land, and thereby causing him damage, the water which would otherwise have been discharged over the defendants' land:—

Held, that the plaintiff's remedy was against the lessee, and that an action négatoire against the defendants, who claimed no servitude over the plaintiff's land, was unnecessary.

CONSOLIDATED APPEAL from the above Court (May 29, 1901).

The appellant, by suit commenced on September 21, 1894, complained that the Seminary of Quebec during the three

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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previous years, and especially during the winter and spring of 1894, by work executed on their property for the purpose of levelling, had interfered with the natural flow of surface waters so as to send them on to the neighbouring property, which belonged to him. He demanded that the defendants be condemned—(1.) to restore the property to its original level; (2.) to take the required means and erect the necessary works to stop the waters from flowing on to his own property; (3.) to pay him $3,200 as damages so far suffered, under reserve of his recourse for future damages, and to pay the costs.

The Seminary of Quebec pleaded that they did carry on some work on their property previous to November 9, 1893, but that such work did not cause any damage to plaintiff's property, and that all subsequent work was done by one H. F. Bellew, who alone was responsible for it. The plea was subsequently amended at the trial with the leave of the Court, so as to allege that Bellew, when he did said work, was in possession of defendants' property under two contracts of lease and promise of sale, and so as to deny more positively any responsibility for Bellew's acts.

Bellew intervened, admitting his responsibility for the work subsequent to November 9, 1893, but denying that said work had caused any damage to plaintiff's property.

The judgment of the Superior Court, Montreal (Doherty J.), held that the works anterior to November 9, 1893, executed by defendants, had caused no damage to plaintiff; that the subsequent works "were not done by defendants or by their orders, or by any one for whose acts they were responsible"; that consequently they were not liable as prayed, but that their sole obligation was to suffer the required works to be done on their property by the person responsible for the damage, or at his expense by plaintiff. The action was therefore dismissed with a reserve of plaintiff's recourse against defendants to the above extent, but without costs, as plaintiff was entitled to presume that the works had been done by the proprietors, to wit, defendants, till the contrary was established, and also on account of the amendment to the plea which had been

made at the trial. As to Bellew's intervention, it was dismissed with costs, because it was proved that the works executed by him had caused damage to plaintiff's property. Bellew did not appeal.

The Court of Review (Taschereau, Loranger, and De Lorimier JJ.), on plaintiff's appeal, reversed this judgment, holding the defendants to be liable. The Superior Court on remand awarded $2518 as damages.

In appeal the Court of King's Bench held that the action, being an "action négatoire," and therefore a real action, was rightly brought against the proprietors, but that the works complained of constituting a delict or tort, and such proprietors not being responsible for the person who had executed them, defendants were not liable for any damages. Consequently all the previous judgments were quashed. Defendants as proprietors were condemned to do the work necessary to stop the flow of surface waters on to plaintiff's property, but the demand for damages was rejected.

Kieffer appealed from that part of this judgment which disallowed his claim for damages. The defendants cross-appealed from that part of it which ordered cessation of the servitude created, and the execution by the defendants of all works necessary for that purpose.

Blake, K.C., and *Lamothe, K.C.*, for the appellant, contended that the action was properly brought against the Seminary, who were the sole registered proprietors of the lands in question. Bellew, notwithstanding the promise of sale contained in his lease, was not qualified to intervene or answer in such an action. The obligation was on the Seminary to restore the original level of their lands, and execute the works necessary to prevent the waters from flowing on the appellant's property. The relief claimed and due was from the Seminary as proprietors of the adjoining land, which had been turned, in respect of the flow of surface waters, from a servient into a dominant tenement. The appellant set up a natural existing servitude in the respondents' land, and resisted the artificial servitude of his own, which had been wrongfully created by

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acts for which the proprietors were responsible. An action négatoire is well taken against the proprietors. The action asks for the establishment and restoration of the appellant's rights, and is a real action, properly taken against the proprietors of the land affected, and the claim for damages, being merely accessory, is also properly made against the proprietors. The sections of the Quebec Code material for consideration are arts. 499, 500, 501; 374, 375, 381, and 413. As regards the position of lessor and lessee, see art. 1618; and on the question of obligations, see arts. 983, 1053–5, 1057, 1065–6, and 1070. From these articles it results that obligations in certain cases arise from the operation of the law alone; among these are certain obligations of owners of adjoining property: such obligations include those arising from the servitude of lower lands towards higher lands to receive the waters which naturally flow down upon them, in respect of which the proprietor of the lower land cannot raise a bank which prevents the flow, still less can he raise the level of his lower land so as to turn its flow upon the naturally higher land.

It results also that every obligation renders the party obliged (in this class of case the owners) liable to specific execution of the obligation when possible, and liable to undo anything done in breach, and liable to damages for that breach. Such was the relation of the Seminary and Kieffer.

In truth the works and materials complained of had become part of the soil of which the Seminary were proprietors; and the servitude attempted was and could be lawfully claimed and exercised only as a natural servitude, in effect as part of the lands of the Seminary, appurtenant to and not severable from them; an incident of the relative levels of the two properties; a result of the lie of the land; something inherent in the property as it stood.

Accordingly the action is a "real action," an "action as to immovables"; it involves "a claim concerning real property"; it is a "petitory action," a "possessory action," an "action en complainte" relating to a real right—an action in effect for the establishment and final settlement of the respective real rights incident to the two properties in respect of the

surface waters servitude, and thus properly brought against the proprietor.

The real meaning of the transaction between the Seminary and Bellew was the creation of a mandat. He was their agent to convert the property by these and other operations into building lots, and for their sale on commission. In that way his acts were authorized by the Seminary; at least, they could and ought to have been prevented by the Seminary, who are mainly responsible for them.

The principles of the Quebec law on the subject are substantially those of the French law as summarized in the Quebec Code, and illustrated by both French and Quebec authorities. Reference was made to Dalloz, Supplément, Jurisprudence générale, No. 434; Demolombe, vol. xii. Nos. 894 et seq.; Pothier, vol. ii., Traité du contrat de louage, No. 211; Troplong, Exchange et louage, vol. iii. Nos. 266, 267; Pothier, Société, vol. iv. 2ème appendice, No. 239; Toullier, vol. iii. No. 510; Duranton, vol. v. No. 170.

Then as to damages. Even apart from all question as to servitude, the proprietor of an inanimate object is responsible for the damages resulting from that object, even when those damages are due to the acts of others, the proprietor retaining his recourse against such others. See Civil Code, arts. 1053, 1055; see also Journal du Palais, vol. xiv. p. 62; vol. xii. p. 472; *Houache* v. *La Commune de Fleury*. (1)

Haldane, K.C., and *Geoffrion*, for the respondents, contended that no ground had been established for holding the Seminary liable for Bellew's acts. There were concurrent findings of fact that no damage was caused to the appellant by the works executed by the respondents, that is prior to November 9, 1893, and that whatever damage he had sustained had been caused by Bellew. That the respondents were not liable for Bellew's acts appeared from the nature of the relation between them. Bellew was the defendants' lessee for one year from November 9, 1893. The lease contained a promise on the part of the respondents to sell, and a promise on the part of Bellew to buy, the leased property at a stated price before the end of the lease.

(1) (1842) Journal du Palais, 274.

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Bellew in possession executed the works complained of. He was not the respondents' servant or employee: see Civil Code, art. 1054; nor was he an ordinary lessee. The respondents had no control over him; their only right was to take back the property if Bellew broke his contract. There is no evidence that he did break it, and there is no ground for saying that the Courts below were wrong in holding that this was not a case of disguised agency. Bellew was not even continuing the respondents' works; his works were on a different part of the property. The action is based on art. 501 of the Civil Code (L. C.), and the respondents are not proprietors within the meaning of that article, and at any rate are not liable for the acts of an independent third party. The article undoubtedly reproduces the old French law. The authorities quoted by the Commissioners in proposing this article shew that it is so. Pothier is quoted by them as one of the authorities from which the article is taken: see Deuxième appendice au contrat de société, art. 2, Nos. 235, 236, 237, 239. See also Pothier, Pandects, bk. 39, tit. 3, s. 32, on servitude of waters (1822), vol. xvi. p. 107; (1825), vol. iii. p. 585; Toullier, vol. iii. p. 374, No. 510; Duranton, vol. v. No. 170; Dalloz, Jurisp. générale (Répert. alphabétique, tit. "Servitude," art. 101, ed. 1859); Aubrey and Rau, vol. iv. p. 768, s. 447. See also *Ferrier* v. *Trépannier* (1); *Kerr* v. *Atlantic and North West Ry. Co.* (2); *Pretty* v. *Bickmore* (3); *Gwinnell* v. *Eamer*. (4)

With regard to the point that the action is a real one and directed against the property alone, if that were really the case the proprietors are the right defendants, since the question would then have been whether their proprietary rights are or will be restricted. Even assuming that the Seminary are, notwithstanding the lease and the contract therein contained, by fiction of law the proprietors, still the action is a real one only to a limited extent. It is real only so far as it prays that certain works be executed on the respondents' estate. When it asks that the respondents be condemned to execute them,

(1) (1895) 24 Sup. Ct. Can. 86, 91, 92.
(2) (1895) 25 Sup. Ct. Can. 197.
(3) (1873) L. R. 8 C. P. 401.
(4) (1875) L. R. 10 C. P. 658.

so far it is not a real action, but a personal one, as much so as the claim for damages. Art. 501 imposes on the proprietors only a negative duty which in this case they have not violated, and therefore an action négatoire does not lie against them. These personal claims cannot be regarded as mere accessories of a real action: they are outside its scope. The liability to damages does not arise under art. 501, which only contemplates a negative duty. Liability in case of breach of contract arises under arts. 1065 and 1071 of the Civil Code; in case of torts under arts. 1053 et seq. The only obligation of the Seminary in their assumed character of proprietors was to permit such works as the Court might order to be executed on their property by Bellew, or at his expense by the appellant.

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Blake, K.C., replied.

The judgment of their Lordships was delivered by

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LORD DAVEY. The questions debated in this case arise out of a litigation between adjoining landowners in the city of Montreal. Both parties were dissatisfied with the judgment of the Court of King's Bench in Quebec sitting in appeal, and have appealed to the King in Council.

The material facts of the case are not now in dispute. Kieffer (the appellant in the first appeal) is the owner of a block of land with houses, outhouses, and shops thereon situate in Ontario Street, in the city of Montreal. Le Séminaire de Québec (appellants in the cross-appeal) are or were at the time of the institution of the suit the owners of a large piece of vacant land with a frontage to Ontario Street, and immediately adjacent to Kieffer's land. The land of Le Séminaire in its natural condition appears to have risen abruptly from Ontario Street for some distance to a kind of plateau. But it is not now in dispute that the lower part of it sloped away from, and was on a lower level than, Kieffer's land, so that the natural drainage of water from the latter was over the land of Le Séminaire. Nor is it now in dispute that no water from the land of Le Séminaire (in its natural condition) was discharged on to Kieffer's land, and Le Séminaire enjoyed no servitude over Kieffer's land in respect thereof.

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Some time prior to November, 1893, Le Séminaire commenced levelling a portion of the higher part of their land with a view to the erection of some buildings thereon. This work was done by Le Séminaire itself, and was concluded prior to November 9, 1893. It is now admitted that no appreciable damage was done to Kieffer's land by the works of Le Séminaire. Subsequently building operations were commenced on the lower portion of the land of Le Séminaire, and for the purpose thereof the level of the lowest part of the ground adjoining Ontario Street was raised, with the effect of diverting the water which would otherwise have been discharged over the land of Le Séminaire on to Kieffer's land. It has been found by the Courts below, and it is not now in dispute, that the works executed subsequently to November 9, 1893, have caused damage to Kieffer, and in fact the damages have been assessed at $2,518·50.

In these circumstances Kieffer on September 20, 1894, commenced his action against Le Séminaire, and by his declaration prayed that Le Séminaire might be ordered (1.) to restore their land to its original condition; (2.) to execute the works necessary to prevent the water flowing on to his land; (3.) to pay damages. Le Séminaire pleaded in substance that the works executed by them prior to November 9, 1893, had not caused any damage to Kieffer, and that the works executed since that date were executed by one Bellew, who was responsible therefor "vis-à-vis les défendeurs." Bellew filed a petition in intervention whereby he alleged that the works since November 9, 1893, were executed by himself, he being in possession of the property, and that consequently he was and acknowledged himself to be responsible for all the damages which Le Séminaire might sustain by reason of these works, and specially for such as they might be ordered to pay in the action in consequence of those works.

It will be observed that neither the plea of Le Séminaire nor the petition of Bellew describes the character in which he was in possession of the land and had executed the works. Consistently with the language used, Bellew might have been the contractor or the mandatory of Le Séminaire, and acting

under their orders. However, on the second day of the trial (October 27, 1895), Le Séminaire obtained leave to amend their plea by alleging that Bellew had been and was then in possession of the lands in question by virtue of a deed of lease and promise of sale of November 9, 1893, and another like deed of December 31, 1894.

On this amended plea the questions arise whether Kieffer has any right to have the land restored to its natural condition or the nuisance abated by or at the expense of Le Séminaire, and whether he has any right of action against Le Séminaire for damages.

What has to be considered is the relation between Le Séminaire and Bellew at the time of the construction of the works and at the commencement of the action. And for this purpose the deed of 9 November, 1893, is alone directly material. By this deed Le Séminaire leased to Bellew for the term of a year from the previous November 1 certain parts of their land (being those on which the works complained of were executed) at a rent of $2,500. Le Séminaire agreed to sell and Bellew agreed to purchase the same land within the year for a price named, payable within five years from November 1, 1893. The other terms of the deed were those of an ordinary building agreement. Bellew was to erect houses with liberty to sell them from time to time, and the purchase-moneys were to be paid to Le Séminaire in part payment of the price of the land, with certain special stipulations as to the character of the houses to be erected, amounts of purchase-money, and so forth. The term of one year thus created was unexpired at the date of the commencement of the action. It appears that Bellew did not fulfil his contract within the year, and the arrangement between the parties was renewed with some variation for a further term by the deed of December 31, 1894, executed pendente lite.

The deed of November 9, 1893, contains no stipulation for the execution by Bellew of the particular works which have caused the nuisance complained of, and no express authority to him for the execution thereof. Nor is there any evidence that the nuisance was necessarily consequent on the execution

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by Bellew of the authorized building operations. On the contrary, it would seem that it might have been obviated by cutting sufficient drains to carry off the water from the high ground. Their Lordships, therefore, think that the legal questions in this case must be answered on the assumption that Bellew was in possession of the land as lessee, and executed the works for his own benefit as intending purchaser, and not as mandatory of or by the direction of Le Séminaire. The learned counsel for Kieffer contended that Bellew's levelling works were but a continuance of the similar works previously commenced by Le Séminaire on the top of the hill. But the evidence does not seem to bear out the contention in fact, and their Lordships do not think the point material.

Doherty J., in the Superior Court, by his judgment rendered April 12, 1897, maintained defendants' amended plea to plaintiff's action, and dismissed the action without costs, the Court reserving to plaintiff such recourse as he might by law be entitled to, and as it might be necessary for him to exercise against the defendants to compel the latter to suffer the re-establishment of the original level of their property, or the doing of such works on such property as might be necessary to prevent the change made in the level thereof from injuriously affecting plaintiff's land at the expense of plaintiff, or of whatsoever person may be liable therefor. Bellew was ordered to pay the costs of his intervention, including one-half of the costs of the enquête. He did not appeal, and drops out of the subsequent proceedings.

By the judgment of the Superior Court in Review dated June 30, 1898, the judgment of Doherty J. was reversed, and it was held that Le Séminaire was under an obligation to restore the original level of their lands and to execute the works necessary to prevent the water from flowing on Kieffer's property, and also to pay damages up to action brought, and it was referred to experts to assess the amount.

There was an appeal by Le Séminaire to the Court of King's Bench. By the judgment of that Court dated May 29, 1901, it was held that in the circumstances Kieffer could not obtain

damages from Le Séminaire, but was entitled to an order upon Le Séminaire to cause the cessation of the servitude of which he complained, and to execute the works necessary for that purpose.

As has been said, neither party is content with this judgment, and both have appealed against it.

Their Lordships are fully sensible of the weight to be attached to the opinion of the three judges who were parties to the judgment of the Superior Court sitting in Review and of Lacoste C.J. and his four learned colleagues on a question of this kind. But, on a consideration of the authorities to which they have been referred, they must hold that the appellant Kieffer has not made out his right to have the so-called servitude discontinued or the nuisance abated by or at the expense of Le Séminaire. They prefer the judgment on this point of Doherty J., expressed in the following "considérant" of his judgment:—

"Considering that if the result of works done by persons other than defendants, and for whose acts the latter are not responsible, has been to alter the level of defendants' property in such manner as to cause water which previously did not do so to flow from defendants' on to plaintiff's land, or to increase the natural flow of water from the land of the former on to that of the latter, defendants are not by law bound at their own expense to cause their land to be replaced in its original condition, or to make the works necessitated by said change of level to prevent water flowing from their land on to plaintiff's, nor to pay the damages resulting to plaintiff from such flow or increased flow of water all as prayed for by plaintiff's action, but that the sole obligation of defendants, in connection with said works, would be to suffer that the original level of their said lands be restored, or effective works made upon their lands to prevent such flow or increased flow of water on to plaintiff's land at the expense of plaintiff, or of the persons by whose acts the level of defendants' land was changed, against whom alone plaintiff has recourse to compel the remedying of the consequences of such change, and for the damages suffered by him in consequence thereof (Pothier,

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Société, 2e appendice, No. 239; 11 Demolombe, No. 47–3; Toullier, 510; 5 Duranton, 1709)."

It is quite true, as the learned Chief Justice says, that "the action is in its nature an 'action négatoire,' and consequently a real action which ought to be taken against the actual holder of a dominant tenement" for the purpose (that is) of negativing the pretended servitude and establishing the consequent right to the cessation of its exercise. But that does not touch the measure or extent of the relief to which the plaintiff is entitled as against the defendants, or the question whether his right is to have the exercise of the pretended servitude discontinued, or the offending work removed by or at the expense of the defendants, or merely the right to enter upon the defendants' land and himself do what is necessary for the purpose. The answer to this question must depend on the requirements of the French law, upon which the Quebec Code is founded.

It is a little remarkable that neither the Quebec Code nor the Code Napoléon contains any express provision on this point. Art. 501 of the Quebec Code (which corresponds to art. 640 of the Code Napoléon) provides as follows :—

"Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man. The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land."

Amongst the authorities which are quoted by the authors of the Code as the foundation of this article is Pothier's treatise on Société, 2nd appendix, 235 to 239, under the title "Des autres obligations que forme le voisinage." Sect. 239 is as follows :—

"Le demandeur conclut, par cette action, à la destruction de l'ouvrage qui lui cause du préjudice. La destruction doit se faire aux frais du défendeur, si c'est de son ordre que l'ouvrage a été fait, ou de quelqu'un dont il soit l'héritier; sinon il n'est tenu à autre chose qu'à souffrir la destruction de l'ouvrage aux frais du demandeur. Si quid ipse feci . . . . mea impensa tollere me cogendum; si quid alius qui ad me

non pertinet, sufficere ut patiar te tollere: quod autem is cui hæres sum hoc fecit, perinde est atque si ipse fecissem. L. 6, § 7, ff. d. tit." The reference to Pothier's Latin quotation (1) is Digest, 39. 3. de aq. 6. 7.

In like manner Dalloz, commenting on the corresponding article in the Code Napoléon (Répertoire alphabétique, tit. "Servitude," art. 101, ed. 1859, vol. xi. p. 83), says:—

"La démolition des ouvrages nuisibles au fonds inférieur est aux frais du propriétaire qui en profitait. Dans le doute, il en est présumé l'auteur. Il ne serait tenu que de laisser démolir si l'ouvrage émanait d'un tiers."

It is unnecessary for their Lordships to comment on the numerous other text-writers who are referred to by Doherty J. or were quoted by counsel in the course of the argument. Their Lordships cannot hold that Bellew was acting under the control or direction of Le Séminaire, or in the circumstances that the latter is responsible for his acts.

With regard to the claim for damages against Le Séminaire, the short but sufficient answer is that given by Lacoste C.J.: "Damages can result only from a fault; this is a personal demand which ought to be made against the author of the fault."

The learned counsel for the appellant Kieffer quoted cases which have been decided in the Canadian Courts against owners of buildings for damage occasioned by some want of repairs or fault of construction, but they turned upon the express provision for such cases in art. 1055 of the Code, and have no bearing on the present case.

The result is that Kieffer, so far as his claim for the cessation of the pretended servitude and for damages is concerned, has sued the wrong person; but this judgment will not preclude his taking any proceedings against Bellew or anybody else which may be still open to him.

Their Lordships will humbly advise His Majesty that Kieffer's appeal should be dismissed and the appeal of Le Séminaire de Québec should be allowed, and that the judgments or

(1) Now printed according to Mommsen's text. There are several verbal inaccuracies in Pothier's citation.

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decrees of the Superior Court in Review dated June 30, 1898, and of the Court of King's Bench of May 29, 1901, and all proceedings thereunder should be discharged, and the judgment of Doherty J. of April 12, 1897, restored, and that the appellant Kieffer should pay the costs of and consequent on the appeal to the Superior Court in Review (including the costs of the inquiry as to damages and of the hearing before Loranger J.) and of the appeal to the King's Bench. The appellant Kieffer will also pay the costs of these consolidated appeals.

Solicitor for appellant: *S. V. Blake.*
Solicitors for respondents: *Simpson & Co.*

[HOUSE OF LORDS.]

THE DUBLIN UNITED TRAMWAYS COMPANY, LIMITED . . . . . } APPELLANTS;

AND

MARTIN FITZGERALD . . . . . RESPONDENT.

H. L. (I.) 1902 Nov. 27.

Tramway Company—Road Authority—Construction of Tramway—Obligation to keep Surface of Tramway in Good Condition—Neglect of Duty—Liability in Damages to Individual—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 28.

Under s. 28 of the Tramways Act, 1870, a tramway company is bound to keep that part of the highway which lies between the rails in a fit and safe condition for the passing traffic to the satisfaction of the road authority; and failure to perform this duty renders the tramway company liable in damages to a person injured thereby.

THE respondent, driving in Grafton Street, Dublin, in March, 1900, was injured through his horse falling on the slippery stones of the appellants' tramway, and brought an action against the appellants for neglecting their statutory duty to keep the paving between the rails in good condition and repair. The appellants' main defence was that they had performed their duty by keeping the roadway in good structural condition and repair, and that it was not their duty to do anything more. They also raised the defences that they were not liable for non-feasance: or to an individual: or otherwise (if at all) than for the statutory penalties.

At the trial before Gibson J. and a special jury it was proved that the tramway had been constructed of the materials and in the manner prescribed by the statutes and directed by the road authority: that the stone setts or paving between the rails became slippery owing to the grit or roughness of the setts being worn away: that this was caused by the ordinary traffic, by the suction of air created by the passage of the electric tramcars and also by high and dry winds, and that in this state the paving between the rails was dangerous and a nuisance. The roadway being in this dangerous state, the corporation

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of Dublin, as the road authority, gave the appellants notice in 1899 to remedy the condition of the pavement either by placing sand daily on it or by any other means rendering it safe and usable for traffic. The appellants neglected to use sand or any other means. It was proved that sanding made the pavement safe.

In answer to questions the jury found—

(1.) That the part of the pavement for which the appellants were responsible at the time of the accident was slippery and unfit for traffic, and in a state of danger and annoyance to ordinary traffic and a nuisance, and that the respondent was injured by reason of that condition of things:

(2.) (*a*) That the accident was not caused by the fabric of the pavement being improperly constructed; (*b*) or improperly maintained: but that it was caused (*c*) by reason of the omission of reasonable precautions, such as sanding, to prevent the pavement from becoming slippery:

(3.) That the appellants (*a*) were not negligent in the construction or the maintenance of the pavement, but (*b*) were negligent in the omission of sanding: and found a verdict for the respondent with 1000*l.* damages. Gibson J. gave judgment for the respondent for that amount and costs.

The King's Bench Division in Ireland (Palles C.B., Johnson and Kenny JJ.) ordered that such part of the findings of (2.) (*b*) and (3.) (*a*) as related to maintenance should be set aside and that the verdict and judgment should stand, overruling all the above-named defences. This decision was affirmed by the Court of Appeal in Ireland (FitzGibbon, Walker and Holmes L.JJ.).

The appellants brought the present appeal.

By s. 28 of the Tramways Act, 1870 (33 & 34 Vict. c. 78):—

"The promoters shall at their own expense at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at the distance of not more than

four feet from each other) the portion of the road between the tramways and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway . . . . Provided always, that if the promoters fail to comply with the provisions of this section the road authority, if they think fit, may themselves at any time after seven days' notice to the promoters, open and break up the road, and do the works necessary for the repair and maintenance or restoration of the road to the extent in this section above mentioned, and the expense incurred by the road authority in so doing shall be repaid to them by the promoters."

The appellants were authorized to use electrical power on their tramways by the Dublin United Tramways Electrical Power Act, 1897 (60 & 61 Vict. c. ccxxxvi.), s. 4 of which incorporated (inter alia) s. 28 of the Tramways Act, 1870.

Sect. 37 of the Act of 1897 was as follows:—

"The company shall at all times maintain and keep in good condition and repair, and so as not to be a danger or annoyance to the ordinary traffic, the rails of the tramways and the sub-structure upon which the same rest, and also the paving, wires, posts, tubes, and electrical apparatus of any description whatever, and if the company at any time fail to comply with this provision, or with the provisions of sections 25 and 28 of the Tramways Act, 1870, they shall be subject to a penalty not exceeding five pounds for every day on which such non-compliance continues, and in the event of any such non-compliance as aforesaid, and without prejudice to any other remedy, the road authority may, after giving to the company forty-eight hours' notice in writing on that behalf, execute and do all works necessary for such maintenance and repair, and for such restoration as aforesaid or as in the said section 28 of the Tramways Act, 1870, is mentioned, and may recover the costs, charges, and expenses of so doing from the company."

Nov. 24, 25, 27. *Balfour Browne, K.C.*, and *Gordon, K.C.* (Irish Bar) (*J. FitzGerald Murphy* with them), for the appellants. The obligation imposed by the Tramways Act, 1870, s. 28, and the Special Act, 1897, s. 37, upon the appellants

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to maintain and keep the roadway between the rails in good condition and repair is confined to structural condition and repair. The duty of scavenging and keeping the highway clear from snow and mud falls not upon the appellants but upon the road authority, and it is they and not the appellants who ought to keep the roadway sanded and fit for traffic. It is admitted that the roadway was properly made and constructed and according to the directions of the road authority; there the duty of the appellants ends unless the roadway, that is the granite setts, require to be relaid or redressed. It is not contended that either of these precautions was requisite. This was the view taken by Boyd J., who dissented from the other judges of the Queen's Bench Division upon a case stated by a magistrate, who convicted the appellants of an offence under the statute. The proviso at the end of s. 28 of the Tramways Act, 1870, is not consistent with any other interpretation of that section: it clearly does not contemplate the road authority breaking up the road in order merely to sand it: therefore sanding is not within the purview of that section.

Serjeant Dodd, K.C. (Irish Bar), and *Lawson Walton, K.C.* (*J. B. Powell*, Irish Bar, with them), for the respondent.

Balfour Browne, K.C., in reply, cited *Ogston* v. *Aberdeen District Tramways Co.* (1)

EARL OF HALSBURY L.C. My Lords, I move your Lordships that this appeal be dismissed. I am of opinion that the judgment of the Court of Appeal is perfectly right, and I am glad to be fortified in that opinion by the unanimous judgment of all the learned judges who have been consulted upon this subject with the single exception of Boyd J. Though it has taken, not unreasonably, a considerable time to argue, the question turns upon a very few words, which I think do not require very elaborate exposition.

The tramway company has been permitted to use a public highway subject to certain obligations, which practically mean that while they are permitted to use the public highway they

(1) [1897] A. C. 111.

shall take care that the safety and convenience of the public shall be preserved. The obligation is cast upon them to keep the highway in a safe and fit condition for public traffic; they are not to have a monopoly of the highway; passengers, horse and foot, are to be allowed to cross these tramways as freely as they were before, except where they will be intercepting or interfering with the use of the tramway as such. As part of the obligation cast upon them by the Tramways Act of 1870, the tramway company are to take what is stated by description, but which really might have been given by actual measurement and, to some extent, is given by measurement—part of the roadway under their immediate superintendence. By "their immediate superintendence" I do not mean that they are to have an independent superintendence; on the contrary, there is a power above them and beyond them under whose authority they are to act. But in the first instance it is their duty to take care of the public convenience in respect of that portion of the highway over which they are permitted to exercise this kind of subordinate dominion. They are under an obligation, therefore, under the words of the statute, both to repair and maintain that portion of the highway which I have indicated.

When your Lordships look at their obligations you see that they are, under the authority and superintendence of what I may describe as their immediate superiors, to make their highway—I speak of it as their highway although it is part of the general highway—fit and proper for the public use as a highway. They are to repair and maintain that portion under the superintendence of the road authority, which has jurisdiction over the whole of the highway. It would appear that under that direction this tramway company have put, as part of their highway, these granite setts upon which the question arises.

One of the obligations which is placed upon them is that they are to repair and maintain that which is described as "paving" in the statute of 1897; they are under no greater and under no less obligation to maintain those setts to the same extent and with the same care as is applicable to the rest of the

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highway under their superintendence. It does not appear to be denied—on the contrary, it is insisted on by both sides—that owing to its particular character this surface roadway of their part of the highway which was placed there by the direction and under the superintendence of the road authority is capable in certain states of the weather of becoming a danger and a nuisance to the public using the highway. As a matter of fact, the jury in this case have found that it had become a nuisance and that it was dangerous, and both the plaintiff and defendants join in the statement that in the actual condition of things when this accident occurred it was a dangerous nuisance. My Lords, it certainly is a somewhat extraordinary proposition to say that although the immediate superintendence of this part of the highway is committed to the defendants, and though they are directed to act under the superintendence of the road authority, it being admitted that on this particular matter they received absolute directions to do the act which would have prevented the accident happening, still there is no liability because they originally constructed something which by the hypothesis in its original construction would not have caused the accident, but have allowed it to get into such a condition that it does cause the accident. Under these circumstances to say that there is no liability seems to me to be a somewhat bold contention.

I confess I do not understand the argument which has last been addressed to your Lordships, that the obligation of repair or restoration to the same condition in which the thing was does not include the restoration of the thing to a condition in which it would not be a nuisance. If that obligation is admitted, and the proper way of doing it is admitted to be by applying sand to the surface, it seems to me that the obligation to apply sand is admitted. Mr. Balfour Browne almost in terms admitted that if the case had been shaped in this way—that these stones having become slippery, partly by reason of the surface being worn away by traffic, the obligation was cast upon the tramway company to take them up again and redress them—they could not deny that they were liable to do it, because it would come under the strictest construction of the

words "repair and maintenance," and "repair and maintenance" is a thing which they were admittedly bound to do. According to the evidence these setts were dressed when they were originally put there, but by reason either of the wear of the traffic or of the weather they are no longer in that condition. It would be a very extraordinary thing to say that the defendants would be liable in that case, but that they were not to be liable when instead of taking up the stones and redressing them they did not take the precaution, which the witnesses on both sides admitted to be the ordinary and usual precaution in the case of a highway being slippery, of putting down sand. It seems to me to be absolutely frittering away the obligation which is created by the Act of Parliament to say that they would be liable to do the same thing in the one way but not to do it in the other.

My Lords, what strikes one on that sort of argument is this, that it is confusing the mode in which the obligation is to be performed with the obligation itself. The obligation, as I read the statute, is to keep that portion of the highway in a fit and proper condition for public traffic. How that is to be done is a question of engineering, and neither the Legislature nor the Courts are called upon, as it appears to me, to enter into the question how it can best be done. The evidence was that the best and most proper mode of doing it was by doing that which the road authority directed the tramway company to do; a direction which they have deliberately disobeyed.

The appellants' contention is answered by the language of the statute itself. I read the statute in its ordinary and reasonable interpretation. It says, "You, the tramway company, are to be in the first instance the persons taking the care and guardianship of this portion of the public highway; but, although we cast that duty upon you to keep it in such a condition as not to be a nuisance, we do not make you an independent road authority; you shall act under the direction of the ordinary and usual road authority, and if you do that your obligation is discharged." If there is any other obligation on the part of the road authority itself we are not concerned to inquire what that is. No question of a conflict of authority

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arises, because here the road authority, which has the power under this statute to give directions, has directed the tramway company to do the very thing which it is generally agreed ought to be done, and they have refused to do it.

Under these circumstances the only question of law which remains is whether the thing which the road authority have ordered the tramway company to do is a thing which can be properly comprehended within the words " maintain and keep in good condition and repair " the part of the roadway which is under their superintendence. I entertain no doubt that those words do comprehend it, and further that the Legislature intended, in giving these special rights to a private company to take part of the highway for their tramway, that they should do that which an ordinary highway authority would be bound to do, namely, to keep it in a fit and proper condition for public traffic. That they have neglected to do, and the accident resulted. I think, therefore, that they are obviously responsible in damages for the neglect of the duty which the jury have found they did neglect.

LORD SHAND. My Lords, I am of the same opinion. It has been contended on behalf of the tramway company that their obligation is fulfilled if, having made the road and laid down the setts that are necessary, they keep that in proper repair, whatever its condition on the surface may be, and that it lies with the municipal authority to see to the condition of the road in that respect when they have so laid it. I have been quite unable to agree with the construction which the appellants' counsel desire to place upon the statute. The obligation relates to the condition of the road for the benefit and safety of the public; it is not only to make, repair, and maintain the line so far as the laying of stones is concerned, but to keep the road—that is, the surface—in good order and condition. It is clear that slipperiness is at different times, according to the weather, a necessary result of the way in which these setts are laid, and danger to the public from this cause arises unless means are taken to prevent it. The tramway company is bound to take the means.

LORD DAVEY. My Lords, I am of the same opinion. A great deal of argument was expended in the Court of Appeal on the question under which statute the tramway company would be liable. It is not necessary to discuss that question. The words of the 28th section of the Act of 1870 are in my view sufficient. Whether the company is also liable under the 37th section of the Act of 1897 or not it is unnecessary for me to say. By s. 28 of the Tramways Act, 1870, the company is bound to keep that portion of the roadway, which is mentioned, in good condition and repair with such materials and in such manner as the road authority shall direct. The road authority directed the tramway company to pave this portion of the roadway with what are called granite setts. I turn to the evidence of the engineer to the corporation in order to understand exactly what is meant by that expression. He tells us that they are granite setts of a particular form—that they are fitted together, and he says, "the stones when put down originally are dressed—that is, the new setts. As soon as this top portion gets worn off by traffic and the dressing becomes worn off the stones they become slippery more or less. In certain states of the atmosphere they are an actual danger to horses and carriages passing over them unless sanded. Sanding is the simplest way to protect them. To redress the stones would be a serious thing." Therefore, my Lords, we have this state of facts—that this portion of the road was made with this granite material as directed by the corporation, the road authority, and the material directed by them to be used had this peculiarity, or this liability, that when the surface was worn off it became slippery in certain states of the atmosphere, and frequently a source of danger to horses passing over it.

What then was the duty of the tramway company when the granite setts had become in this state? They must keep this roadway "in good condition and repair," and if the roadway as originally constructed had by the wearing of the traffic or by any other cause been brought into such a state as to become slippery and dangerous to horses passing over it, it is clear that their obligation was not fulfilled of keeping it in a good condition. Their duty then was to restore it to a

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good condition. Now, the corporation have taken exactly this view: they have required the tramway company to meet the difficulty in this way, "either by placing sand daily on such pavement aforesaid, or by any other means rendering safe and usable the said pavement for traffic," and then the engineer to the corporation goes on to say, "and I require you to forthwith acquaint me of some reasonable and proper mode by which you propose to remedy the condition of such pavement." It seems to me that that was a perfectly proper notice. What the corporation required them to do was to restore the tramway to a good condition to their satisfaction, leaving the choice to the tramway company either to use a temporary expedient, such as sanding the road, or, I suppose, if they had any other mode by which they could restore the road to a good condition they were at liberty to tell the corporation what they proposed to do and to take that other measure. But what I wish to impress upon your Lordships is this—that it is not a mere question of sanding; that is merely a mode in which the defect could be cured; but what did require to be cured was that the pavement to the extent I have mentioned had become out of good condition and repair and needed to be restored to or kept in that good condition either by some temporary expedient such as sanding, or by some more permanent mode of meeting the defect in the granite setts after they had become worn. It was owing to their having become worn, and thereby become dangerous, that the notice required to be served. In those circumstances what has been called sanding, or, I prefer to say, meeting in some proper mode the defect in the granite setts which time had exposed, was really supplemental to, and part of, the construction of the pavement; it was making the pavement. The pavement, I assume, as originally constructed, was properly constructed, but this notice was a requirement that the pavement which had been properly constructed in the first instance should be supplemented by some means for securing the streets being in a good condition for the purpose for which streets are needed, namely, the passage of horses.

My Lords, some argument was addressed to your Lordships

based upon the findings of the jury. I must confess that I do not think the questions were very happily framed for the jury, but when they were asked whether the tramway company were negligent as regards the construction or maintenance of the pavement, to which the answer was "No," I must assume that what was meant was in the supply of the materials, the stone and so forth from which it was constructed, because otherwise it appears to me that the answer is inconsistent with the next answer, for, when they are asked whether the tramway company were negligent in not sanding the roadway, they say "Yes." Sanding the roadway is only a means of maintaining it in proper condition and repair; therefore I think the two answers are on the face of them rather inconsistent in themselves. But your Lordships will not, of course, be hampered by any imperfection in the way in which the questions were put to the jury; we have to decide the substance of the case, and I entirely agree with the conclusions which have been expressed by my noble and learned friend on the Woolsack.

I have only to add that in nothing which I have said have I expressed any opinion, nor do I intend to express any opinion, as to the respective duties of the tramway company and the corporation as regards what has been called scavenging—that is to say, as to the ordinary duty of cleansing the streets, and duties of that kind. I regard this case as depending entirely upon the liability of the tramway company to keep the pavement which they have laid down in the road in good condition and in the manner directed by the corporation.

LORD ROBERTSON. My Lords, I accept the doctrine, which has been strongly urged upon your Lordships by the appellants, that what they have got to keep in good condition is the structure or fabric of their part of the roadway. But then the surface is part of that structure or fabric, and, as this is a roadway, a very important part. Now, one of the qualities of the setts of which the structure is composed is that with use the surface loses its original roughness which is its element of

H. L. (I.) 1902 DUBLIN UNITED TRAMWAYS COMPANY v. FITZGERALD. Lord Robertson.

safety, and in certain states of weather is slippery and dangerous. Now, what sand supplies is simply this grittiness, which originally was supplied by the roughness of the setts themselves. Accordingly, while it cannot be asserted in ordinary weather that the setts are in bad condition, yet on the other hand in certain weather it cannot be asserted that they are in good condition. Therefore, if the appellants use materials having this kind of surface, they must from time to time supply by sand to this material what other materials might of themselves in all conditions supply by the roughness of their own surface. On this ground I concur in the decision of the Courts in Ireland.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 27, 1902.

Solicitors: *Clay & Close, for Casey & Clay, Dublin; Stibbard, Gibson & Co., for James FitzGerald, Dublin.*

[HOUSE OF LORDS.]

PELHAM CLINTON . . . . . APPELLANT;

AND

DUKE OF NEWCASTLE . . . . . RESPONDENT.

H. L. (E.) 1903 Feb. 24.

Will—Construction—"Issue"—Estate in Special Tail—Rule in Shelley's Case.

A devise to "Charles if he marries a fit and worthy gentlewoman and his issue male to such issue male and their male descendants in failure of which" then over:—

Held, upon the true construction of this will to be equivalent to a devise to "Charles and such issue male as he may have by marriage with a fit and worthy gentlewoman and their male descendants, in failure of which" then over, and thus to create an estate in special tail male in Charles.

The decisions of Buckley J. and the Court of Appeal, [1902] 1 Ch. 34, affirmed for the reasons given by Buckley J. and Romer L.J.

THE fourth Duke of Newcastle by will dated January, 1814, devised all his freehold estates to the use of his first and other sons by his then wife successively in tail male, with remainder to the use of the heirs male of his (the testator's) body, with divers remainders over. One of his sons was Lord Charles Pelham Clinton.

The Duke afterwards, by a fifth codicil dated August, 1846, "bequeathed" to Lord Charles certain estates, with power to "Lincoln" (the testator's eldest son) to purchase and redeem those properties for certain sums of money: "the proceeds to go with the limitations of this will that is to say to my son Charles if he marries a fit & worthy gentlewoman & has issue male to such issue male & their male descendants in failure of which to my son Thomas to the exclusion of any issue by his present wife but to his issue male by any future wife should she be a fit & worthy gentlewoman in failure of which to my son William & his issue male lawfully begotten & provided that he may marry a fit & worthy gentlewoman in failure of which to my eldest son Lincoln & his issue male & their descendants lawfully begotten."

H. L. (E.) 1903 PELHAM CLINTON v. NEWCASTLE (DUKE OF).

The Duke died in January, 1851. Afterwards Lord Charles disentailed the estates given to him, and by various deeds and deaths they became vested in the seventh Duke, the respondent. Lord Charles married a fit and worthy gentlewoman and died in 1894. His eldest son was the appellant, born in 1857, after the testator's death. Buckley J. held in an action brought by the appellant against the respondent that the true construction of the will was as stated in the head-note.

Warrington, K.C., and *A. F. Peterson*, for the appellant, cited the cases and submitted the arguments which are fully set forth in the report below.

Haldane, K.C., *Vaughan Hawkins* and *Benn*, for the respondent, were not heard.

EARL OF HALSBURY L.C. My Lords, it appears to me that this case is entirely free from difficulty, and that the language we have to construe is perfectly clear. If you look at the construction of the will, to suggest any difficulty is to my mind almost an absurdity. It is admitted that almost the same words in another part of the same codicil are intended to point to an estate in special tail male, and we are asked to single out this particular gift as being something different.

I have nothing to add to what Buckley J. originally said; I am quite satisfied with his judgment, and I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think everything that can be said on this will has been said, and very well said, by the learned judges who have given their judgments in the Court below. I am quite content to adopt the reasoning of Buckley J. and Romer L.J., and I do not share at all in the difficulties that presented themselves to Vaughan Williams L.J. I think Buckley J. summed up the case very well when he said that it was exactly the same as if the testator had said "to my son Charles and such issue male as he may have by marriage with a fit and worthy gentlewoman." I

do not think any one could suggest that that was not an estate in special tail male.

LORD SHAND. My Lords, I am of the same opinion.

LORD DAVEY. My Lords, I also am of the same opinion, and, like my noble and learned friends, I really cannot understand the difficulties in the case. It seems to me to be one of the plainest cases for an estate tail that I ever saw. Mr. Warrington endeavoured to say that there was enough in the words to imply an estate for life to Charles; but, as I pointed out to him, supposing it had been expressly given to Charles for life, the decision would have been exactly the same as the decision at which we now arrive. Speaking for myself, I am entirely satisfied with the reasons which have been given in the Court below.

LORD ROBERTSON. My Lords, I concur.

LORD LINDLEY. My Lords, I am of the same opinion, and I cannot usefully add anything.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 24, 1903.

Solicitors: *Blair & W. B. Girling; Richard F. & C. L. Smith, for Marshalls & Bate, East Retford.*

[HOUSE OF LORDS.]

H. L. (E.) 1903 March 9.

STARKEY . . . . . APPELLANT;

AND

BANK OF ENGLAND . . . . . RESPONDENTS.

Principal and Agent — Bank of England — Transfer of Stock—Power of Attorney—Implied Warranty of Authority—Innocent Misrepresentation—Forged Power—Liability of Agent.

The principle of *Collen* v. *Wright*, (1857) 8 E. & B. 647, 657, is not confined to cases where the transaction with the person representing himself to be an agent results in a contract.

A broker applied to the Bank of England for a power of attorney for the sale of Consols believing himself to be instructed by the stockholder, and bonâ fide induced the bank to transfer the Consols to a purchaser upon a power of attorney to which the stockholder's signature was forged:—

Held, that the broker must be taken to have given an implied warranty that he had authority, and that he was therefore liable to indemnify the bank against the claim of the stockholder for restitution.

Decisions of Kekewich J., [1901] 1 Ch. 652, and the Court of Appeal, reported as *Oliver* v. *Bank of England*, [1902] 1 Ch. 610, affirmed.

In December, 1897, a sum of Consols was standing in the joint names of F. W. Oliver and his brother Edgar in trust for others. F. W. Oliver wrote to a firm of stockbrokers of which the appellant was a member, inclosing an application to the Bank of England to issue a power of attorney from F. W. and Edgar Oliver to the appellant and his partner to transfer the Consols, and requesting the brokers to lodge the application with the bank. The appellant having lodged it, the bank issued to the brokers a power of attorney to sell and transfer, and sent notices to F. W. and Edgar Oliver at the addresses given in the application that a power had been applied for. No notice reached Edgar Oliver. The brokers forwarded the power to F. W. Oliver, who returned it to the brokers executed by him, and purporting to be executed by Edgar. The brokers, believing that all was right, sold the Consols, and the power was lodged at the bank by the appellant,

who afterwards signed the "demand to act" indorsed on the power and executed the transfer to the purchaser. A similar transaction afterwards took place with regard to a transfer of bank stock. After F. W. Oliver's death in 1899 it was discovered that the signatures of Edgar Oliver to the powers of attorney were forgeries and that he knew nothing of the transactions. Edgar Oliver having brought an action against the bank for restitution the appellant was made a third party upon a claim of indemnity by the bank. The action was tried before Kekewich J., whose judgment declared that the transfers were invalid, and ordered the bank to place equivalent amounts of Consols and bank stock in the name of Edgar Oliver in the bank books and to pay him a sum equal to the dividends which had accrued since the transfers; and also ordered the appellant to indemnify the bank by similar transfers and payment to the bank. (1) This decision was affirmed by the Court of Appeal. (2)

March 6, 9. *Upjohn, K.C.*, and *Rufus Isaacs, K.C.* (*Stewart-Smith, K.C.*, and *Stamp* with them), for the appellant, contended that no action lies for an innocent misrepresentation, nor even for a false statement made through carelessness but in the honest belief that it was true though without reasonable ground: *Derry* v. *Peek* (3); that the exception from this absolute rule established by *Collen* v. *Wright* (4) applies only to transactions resulting in contract; that there was no decision in favour of the contrary view; that dicta of Lord Esher M.R. in *Firbank's Executors* v. *Humphreys* (5) were unsound; and that they and any similar dicta elsewhere as well as *Collen* v. *Wright* (4) might be, and if necessary should be, overruled in this House. They also carefully examined the authorities and developed the arguments which are clearly and fully set forth in the reports of the decisions below.

H. D. Greene, K.C., *Latham, K.C.*, and *Howard Wright*, for the respondents, were not heard.

(1) [1901] 1 Ch. 652.
(2) [1902] 1 Ch. 610.
(3) (1889) 14 App. Cas. 337.
(4) 8 E. & B. 647, 657.
(5) (1886) 18 Q. B. D. 54, 60.

H. L. (E.) 1903 STARKEY v. BANK OF ENGLAND.

EARL OF HALSBURY L.C. My Lords, I confess I have been puzzled to think how I should have argued this case on the part of the appellant if I had had the duty of doing it. The two learned counsel have very ingeniously occupied a considerable time in endeavouring to solve the difficulty I should have had. I entertain no doubt upon the question: it seems to me that there never has really been any doubt. Taking the original judgment in *Collen* v. *Wright* (1), I will just read three passages from it. Lord Campbell says: "There can be no doubt that the testator asserted that he had authority to let the property on the terms to which he agreed. That is a promise and a warranty. Might he not then have been sued on the warranty, although he believed it to be true? If he induced the plaintiff to act upon it, he was bound. It is broken since the testator had not authority." Wightman J. says: "If a man makes a contract as agent he does promise that he is what he represents himself to be, and he must answer for any damage which directly results from confidence being given to the representation." Crompton J. says: "I am of the same opinion. The first question is, Whether an action lies on the contract of a person representing himself to have authority, there being good consideration for such contract." Those three statements seem to me to cover the whole ground. And those statements are corroborated by the full Court of Exchequer. The whole number, therefore, of the judges who held both of those principles to be part of the law of England was nine judges, and it was nearly fifty years ago. That seems to me to render this case free from doubt.

I do not seek to go into the principles upon which that law may be supposed to rest. It is enough for me to say that, at any rate upon the grounds there stated, it has been the law for fifty years, enunciated by judges of the highest authority. I have not the least notion how that state of the law is supposed to have been shaken by the decision in *Derry* v. *Peek*. (2) We have more than once been informed that *Derry* v. *Peek* (2) is supposed to have altered the law. I do not think *Derry* v. *Peek* (2) has anything to do with it. *Derry* v. *Peek* (2) was an

(1) 7 E. & B. 301; 8 E. & B. 647, 657. (2) 14 App. Cas. 337.

action for deceit, and this House held that where it was an action for deceit you must prove deceit, and you must prove mala fides on the part of the person who deceived the other. I suppose that was no new law: the application of that law to the particular case became a question of fact, and purely of fact. Some of us thought—I myself did—that the facts were rather in favour of the view that there was intentional deceit; but that was a question of fact, and it was disposed of by the Court below. The House was unanimous in affirming that the Court below was right in coming to the conclusion that there was in fact no real deceit.

But what has that to do with the present case? Here is a formal document intended to be acted upon, which, upon the face of it, purports to be a representation of authority by the persons whose signatures purport to be appended thereto. Upon the facts I should have thought it was impossible to doubt that that was a representation of authority on the part of those two persons whose signatures purport to be to it, and the person who presents the authority and demands to act upon it is himself asserting that he has authority to do the thing he is doing. He had no such authority. The result is that the bank have transferred a quantity of Consols standing in the names of two persons when only one person gave the authority.

That appears to me to come within the decision to which I have referred, and I do not think it is necessary to go through the catena of cases upon that subject. It is said that this case is extending the principle of *Collen* v. *Wright*. (1) I do not think it is. It seems to me as a matter of principle to fall exactly within *Collen* v. *Wright*. (1) I am not able, and I never have been able, from the beginning to the end of the argument, to understand what is meant by saying that there is a distinction which makes it an extension of *Collen* v. *Wright* (1), because the consequence in *Collen* v. *Wright* (1) was a contract, but here no such consequence follows. I think that is absolutely immaterial. The argument arises from a confusion as to whether the facts made a contract between the plaintiff and the defendants, and the difference of whether or

(1) 7 E. & B. 301; 8 E. & B. 647, 657.

H. L. (E.) 1903 STARKEY v. BANK OF ENGLAND. Earl of Halsbury L.C.

not a contract follows in consequence of the representation made; that seems to me an absolutely illogical and unintelligible distinction. That which does enforce the liability is this—that under the circumstances of this document being presented to the bank for the purpose of being acted upon, and being acted upon on the representation that the agent had the authority of the principal, which he had not, that does import an obligation—the contract being for good consideration—an undertaking on the part of the agent that the thing which he represented to be genuine was genuine. That contains every element of warranty.

The result is, I think, that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD ASHBOURNE. My Lords, I entirely concur. I do not think that any of your Lordships have had any doubt at any period during the argument as to the proper conclusion to be arrived at.

LORD MACNAGHTEN. My Lords, I entirely agree.

LORD DAVEY. My Lords, I also agree. The point made by Mr. Rufus Isaacs seems to be this—that *Collen* v. *Wright* (1) was an exception from the rule that an innocent misrepresentation gives no cause of action, and as an exception is confined to the particular case in which it was laid down; and that *Collen* v. *Wright* (1) having been a case in which a supposed agent induced a third party to enter into a contract with him, it must be confined to the cases where the transaction entered into with the supposed agent was in the nature of a contract. I think that would be a very narrow construction to put upon the rule laid down, and not in accordance with the statement of it by other learned judges. I will not trouble your Lordships by reading what Lord Bramwell said in *Dickson* v. *Reuter's Telegram Co.* (2), but he pointed out that it was a fallacy to treat it as an exception from the law relating to actions of deceit, that it really and truly was a separate and independent rule of law. As a separate and independent rule

(1) 8 E. & B. 647, 657. (2) (1877) 3 C. P. D. 1.

of law it is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person.

Mr. Upjohn's argument addressed to us to-day took a different line. As I understand it, the whole stress of his argument has been to shew that this case is not an exception from the rule as to actions of deceit, and that the rule as laid down in *Collen* v. *Wright* (1), and other cases which need not be enumerated, does not extend to cases where the supposed agent did not know that he had no authority and had not the means of finding out.

It is sufficient to take the earliest cases in which the rule is stated, and I will take for example a case older than *Collen* v. *Wright* (1), *Lewis* v. *Nicholson* (2), in which Lord Campbell states the doctrine thus. After saying that "in no case where it appears that a man did not intend to bind himself, but only to make a contract for a principal, can he be sued as principal, merely because there was no authority," he says: "He is liable, if there was any fraud, in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not."

Other cases might be cited to the same effect, and I am of opinion that it is utterly immaterial for the purpose of the application of this branch of the law whether the supposed agent knew of the defect of his authority or not, and indeed that is the very doctrine which is asserted by Story J. in the first edition as well as in subsequent editions of his work on Agency to which a reference has been made. (3) The same point was also, as I understand the case, dealt with in *Cherry* v. *Colonial Bank of Australasia.* (4)

LORD ROBERTSON. My Lords, I concur.

LORD LINDLEY. My Lords, this is the first time I ever heard *Collen* v. *Wright* (1) disputed. It is good law, and

(1) 8 E. & B. 647, 657.
(2) (1852) 18 Q. B. 503.
(3) Story on Agency, s. 264 (ed. 1839, p. 226).
(4) (1869) L. R. 3 P. C. 24.

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according to Story J. it was law long before that case. I do not quite understand the observation made by Cockburn C.J. that there was nothing in Story against the view which he took. Whatever may be said of other cases, *Collen* v. *Wright* (1) is sound, *Firbank's Executors* v. *Humphreys* (2) is sound, and so is this decision.

Judgment of Kekewich J. and order of Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 9, 1903.

Solicitors: *Morley, Shirreff & Co.; Freshfields.*

[HOUSE OF LORDS.]

H. L. (E.) 1903 *March* 10.

INDERWICK AND OTHERS . . . . . APPELLANTS;

AND

TATCHELL AND OTHERS . . . . . RESPONDENTS.

Will—Construction—Survivor.

A will gave portions in trust for each of the testator's children, E., L., and T., for their respective lives, and afterwards for their respective children; provided that if any of his children died without leaving a child entitled to take under the will, the shares of such children should go to their "then surviving" brothers and sisters, if more than one in equal shares, and if only one then to him or her absolutely.

E., L., and T. all survived the testator. E. died first, leaving children. Then L. died without issue, leaving T. surviving:—

Held, that upon the true construction of this will the words "then surviving" must receive their ordinary and natural meaning, and that the children of E. took no part of L.'s share.

The decision of the Court of Appeal, [1901] 2 Ch. 738, affirmed.

THIS appeal turned entirely upon the meaning of the words "then surviving" in this particular will. The clauses of the will are fully set out in the report below. Shortly the question

(1) 8 E. & B. 647, 657. (2) 18 Q. B. D. 54, 60.

arose thus: John Inderwick by will made in 1867 gave seven portions of property in trust for his seven children for their respective lives, and after their respective deceases in trust to convey to their respective children then living in equal shares as tenants in common; Provided that in the event of any of the testator's children dying without leaving children entitled to take under the will, the shares of such children, both original and accruing under the present clause, should go to their "then surviving" brothers and sisters, if more than one, in equal shares as tenants in common for their respective lives, and after their respective deceases to their respective children in the manner thereinbefore provided with respect to his said children's original shares, and if there should be but one such surviving brother or sister, then to him or her absolutely.

Of the seven children (all of whom survived the testator) three sons died without issue, then a fourth son, Edward, died leaving children him surviving, then a daughter, Louisa, died without issue, leaving two of the testator's daughters her surviving. In an action brought by the children of Edward against the testator's two surviving daughters, Kekewich J. gave judgment for the defendants, declaring that Edward's children had no interest in the original and accrued portions of Louisa; and this decision was affirmed by the Court of Appeal (Lord Alverstone C.J., Vaughan Williams and Romer L.JJ.). (1) Edward's children brought the present appeal.

March 9, 10. *Haldane, K.C.*, and *Dauney*, for the appellants, contended that the words "then surviving" did not bear their ordinary and natural meaning, but must be construed to mean "other." They cited the authorities discussed in the report below, none of which, after full discussion, appeared to throw any light upon the intentions or expressions of this testator or the construction of this will.

Neville, K.C., *Warrington, K.C.*, and *Samuel Dickinson*, for the respondents, were not heard.

(1) [1901] 2 Ch. 738.

H. L. (E.) 1903 INDERWICK v. TATCHELL.

EARL OF HALSBURY L.C. My Lords, I confess I approach the interpretation of a will with the greatest possible hesitation as to adopting any supposed fixed rule for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction; and if I cannot, why then I think one must read the whole instrument as well as one can, and conclude what really its effect is intended to be by looking at the instrument as a whole. By the hypothesis it does not speak for itself, but you must arrive at some interpretation which will make it speak, and make it speak intelligibly. I so far go with the contention of the appellants here, that I think it is quite possible—nay, I may go further and say I think it is probable—that if the testator had contemplated the particular event that has happened in this case he would have provided for it. But with that single observation, I am not at liberty, because an event has happened which I think has not been provided for, to conjecture what the testator would have provided if he had thought of it beforehand. I am not at liberty to disregard the application of the ordinary rule of construction of every document, namely, that you must look at the whole document, and, if you can, you must read the words according to their natural and reasonable meaning.

My Lords, applying that test, which I believe is the proper test to apply both to a will and to every other document, I am unable to see that there is in this will any context which prevents my reading the words according to their natural sense and in the ordinary grammatical way in which they ought to be read; and I am very reluctant to encourage the suggestion that you may wander from the actual words of a will into the region of conjecture as to what it is reasonable to suppose the testator would have done had he contemplated a certain event happening. I protest against the notion that any canon of construction entitles you to indulge your imagination and go into what the testator would have said if he had thought of it.

Reading the words as I think they ought to be read, in their natural and ordinary construction, the will is intelligible

and is rational, and even if I thought the result was unjust there is no canon of construction which entitles me on that ground to alter my construction of the words as they stand. The only question, therefore, is whether there is anything in the context which enables me to read these words in a sense different from that which they ought in the ordinary use of the English language to bear.

I confess I do not much like the use of one or two expressions which have been used in the cases which have been quoted to us. It is not fair to speak of them perhaps as abstract observations, they are applied to the particular instruments which the learned judges were construing in those cases; but I cannot help saying that the word "survivor" is a word which requires a context. Survivor of whom? Survivor when? Those are both categories of thought which must be supplied in order to give the word "survivor" any meaning at all. It may mean the survivor of the testator; it may mean the survivor at the time of some event contemplated by the will which is being discussed; and what it is must be found out by reference to the context. Now, in this case I wish to give every effect to the context, and when I look to see if there is anything in the context which controls, cuts down, or explains otherwise than the words themselves do, what is referred to by those words, I can find nothing that entitles me to go beyond the words themselves in the context in which they stand. Under those circumstances it appears to me that the decision of both Courts below was right. I therefore move your Lordships that this appeal be dismissed with costs.

LORD ASHBOURNE. My Lords, I agree. Having regard to the context and the actual words used, "the then surviving brothers and sisters," I think those words must have their ordinary meaning and be given their primâ facie and literal signification. Taking the will as a whole and trying to gather from every legitimate source the meaning of the words which the testator himself uses in his will, I see nothing that would justify me in seeking to give these words a wider or more extended meaning.

H. L. (E.) 1903 INDERWICK v. TATCHELL.

LORD MACNAGHTEN. My Lords, I am entirely of the same opinion. I think Kekewich J.'s decision was perfectly right. It seems to me that the language used by the testator when he speaks of the "then surviving brothers and sisters" of the person whose death he was contemplating, clearly points to actual survivorship at a particular time, and that there is no room for the construction which Mr. Haldane asks us to put upon the words in the will.

LORD DAVEY. My Lords, Kekewich J. in the opening passage of his judgment says that there is no authority which can either fetter or assist the Court in the construction of this will. I think we are in the same position, and I am at liberty to approach this will unfettered by authority to say what is the meaning of the words which the testator uses. That being so, my Lords, I find, looking at the will, that upon the death of any child without issue the share of the child so dying is to be divided between the "then surviving brothers and sisters." Now that clearly points to actual survivorship at a particular period, namely, the death of the person upon whose death the succession opens.

But, my Lords, in addition to that, I find in another clause two other passages in which the same expression, "surviving brothers and sisters," is used, and that clause says this: "If there should be one such surviving brother or sister, then to him or her absolutely." Now Mr. Haldane could not but admit that in that passage at any rate "surviving brother or sister" must mean literally what it says—that is, a brother or sister then surviving—and cannot include the children of a predeceased brother or sister in whom the deceased parent is supposed to survive. Again, in what has been called the second accruer clause, the ultimate division is amongst the "then surviving brothers and sisters in equal shares as tenants in common" absolutely. There again there is no room whatever for the suggestion that "then surviving brothers and sisters" can mean anything but what it says. Therefore, if I am to construe the words "their then surviving brothers and sisters" by reference to the whole of the will, so far from

finding a context to support the artificial, or what Mr. Haldane called the "notional," construction of the words, I find in other passages, where the same words are used relating to similar subject-matter, no other meaning than the literal meaning can be given to them.

Now what is the context upon which reliance was placed? It was this: After giving the share to the surviving brothers and sisters as tenants in common for their respective lives, and after their decease amongst their children, the testator goes on to say, "in the manner hereinbefore provided with respect to my said children's original shares or bequests and interests, and in addition to those original shares or bequests and interests." Now, my Lords, I assume that the words "my said children" refer to what he called "my said children" in the earlier part of the clause, namely, all his children; but I cannot see how that supplies a context for construing the words "surviving brothers and sisters." That clause merely provides the manner in which those who take as surviving brothers and sisters, whoever they may be, are to take. They are to take in the manner provided with respect to the children's shares generally, namely, they are to take it themselves for life, and afterwards for their children, and in addition to their original shares. But to my mind it supplies no context whatever which should induce any person who has to construe this will to put other than the naturally obvious and literal meaning upon the words as to those who are to take. In other words, the clause relied upon is merely a description of the manner in which the gifts over are to be enjoyed, and does not affect the description of the objects who are to enjoy, in the earlier part of the clause.

My Lords, I do not think it necessary to detain your Lordships any longer, and I have nothing more to say except that I concur in the judgment which has been proposed.

LORD ROBERTSON. My Lords, I entirely agree.

LORD LINDLEY. My Lords, I am of the same opinion. I have listened to the argument in this case, and it appears to me that the intention of the testator, as expressed by his

H. L. (E.) 1903 INDERWICK v. TATCHELL. Lord Lindley.

language, would not be defeated or be inadequately fulfilled if the words he has used are taken in their ordinary signification. The most that can be said is that if so taken the language leads to results which the testator probably did not foresee and specially provide for. I do not think that is sufficient to justify your Lordships in departing from the language he has used.

Judgment of Kekewich J. and order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 10, 1903.

Solicitors: *Collisson, Prichard & Barnes; Garrard, James & Wolfe.*

[HOUSE OF LORDS.]

(APPEAL COMMITTEE.)

H. L. (Sc.) 1903 *March* 20.

CALEDONIAN RAILWAY COMPANY . APPELLANTS;

AND

BARRIE . . . . . RESPONDENT.

Practice—Appeal against Costs—Competency of Appeal.

The House of Lords will not entertain an appeal against costs only.

APPEAL against a judgment of the First Division of the Court of Session, Scotland. (1)

On February 5, 1901, the respondent George Barrie, cattle dealer, consigned to the appellants, the Caledonian Railway Company, cattle for conveyance from Careston to Glasgow. The cattle were consigned and conveyed under a contract at reduced rates, the respondent agreeing to relieve the appellants from all liability for any damage except on proof that such damage arose from the wilful misconduct on the part of the appellants' servants. Some of the cattle were injured. No account of the accident was sent to the respondent. On February 19 the respondent wrote to the appellants remon-

(1) (1902) 40 S. L. R. 50.

strating that no notice was given, and claiming 49*l.* as damages. No answer was returned to this letter. In March the respondent wrote to the appellants threatening an action. The appellants replied that in view of the owners' risk contract they were relieved from liability. The next step was that the respondent was informed that the appellants did not allow their servants to be precognosced or examined without the sanction of their solicitor. The respondent thereupon wrote to the appellants' solicitor: "I wish to get full information as to the cause of the occurrence before doing anything, but find that all the witnesses are in the appellants' service. Will you please give the necessary instructions to allow me to precognosce the men engaged in shunting operations when the accident took place." On July 18 the appellants' solicitor replied that the appellants could not agree to the respondent precognoscing their servants, at least at this stage of the matter. Thereupon the respondent raised this action in the Sheriff's Court at Forfar. The appellants pleaded that the cattle had not been injured by the misconduct of their servants, and that they were accordingly not liable. A day was appointed for closing the record, and the respondent asked again to be allowed to precognosce the appellants' servants. The request was refused. The record was closed on October 17, and evidence appointed to be taken on November 8. On October 21 the appellants wrote to the respondent for the names of the company's servants whom he wished to precognosce, &c. The respondent replied: "Beyond the pointsman I do not know which of the servants of the company can give evidence. This is the direct result of the appellants refusing to allow an inquiry. I must therefore have the necessary facilities for precognoscing witnesses and examining the locus"; and that unless the appellants would tender this assistance he would bring the matter before the Court. No further correspondence took place. A proof was taken, and the sheriff-substitute found that the injury to the respondent's cattle was not caused by the wilful misconduct of the appellants' servants, and assoilzied the appellants from the action; but he gave no costs. The respondent acquiesced in the decision on the merits, but

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appealed to the sheriff on the ground of costs. The sheriff held the respondent entitled to his costs. The appellants appealed to the Court of Session.

The Court of Session, on November 1, 1902, affirmed (Lord M'Laren dissenting) the decision of the sheriff. Lord Adam said: "Now an appeal on the question of costs is not very common; but I must say that this case does raise a question of principle on which this Court will be quite right in expressing their own views without at all interfering unduly with the discretion of the presiding judge before whom the case came in the first instance. It will be observed that this is not a question of the conduct of the appellants during the course of the trial whereby their conduct leads to costs being incurred. It depends on the construction and meaning of a correspondence between the parties, and their actings before and during the getting up of the case for the trial. That is a case in which the Court would be entitled to apply their minds and to say whether the course adopted by the sheriff was a right or wrong one. After reading the correspondence, I think the sheriff was right." Lord M'Laren said that he thought some question of principle was raised, but it appeared to him that there was no refusal on the part of the appellants to give information before the action was raised. His Lordship continued: "The conduct of the parties in the cause has always been a legitimate element for dealing with costs in a way different from the normal one, and if the case had rested on the sheriff-substitute's judgment I should certainly not have proposed to interfere with it. But just as I should support the discretion of the sheriff-substitute, I see no ground whatever in the circumstances of the case for altering that judgment and imposing on the appellants the penalty of being made to pay the respondent's costs."

The appellants appealed to this House on the question of costs only, both parties agreeing that no facts were in dispute.

The respondent objected to the competency of the appeal.

Mr. Beveridge, as agent for the respondent, cited Macqueen's Practice of the House of Lords, p. 94, Denison and Scott's

House of Lords Appeal Practice, p. 67, *Tod* v. *Tod* (1), *Home* v. *Pringle* (2), and the Judicature Act of Scotland, 1825 (6 Geo. 4, c. 120), s. 40: "When in causes commenced in any of the Courts of the sheriffs . . . . the judgment on the cause . . . . shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law."

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THE APPEAL COMMITTEE (Lords Macnaghten, Shand, Davey, Robertson, and Lindley) held that the appeal, being on the question of costs only, was incompetent, and dismissed the appeal with five guineas costs.

Lords' Journals, March 20, 1903.

Agents for appellants: *Grahames, Currey & Spens, for H. B. Neave, Solicitor, Glasgow.*

Agents for respondent: *A. & W. Beveridge, for Smith & Watt, W.S., Edinburgh.*

[HOUSE OF LORDS.]

THE SCOTTISH PROVIDENT INSTITUTION . . . . . } APPELLANTS;

AND

JOHN ALLAN (SURVEYOR OF TAXES) . RESPONDENT.

H. L. (Sc.) 1903 *April* 30.

Revenue—Income Tax—Interest from Colonial Investments—Remittances not identified as Capital—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Case* 4.

By s. 100 of the Income Tax Act of 1842 it is provided that the duty chargeable under Sched. D, case 4, in respect of interest from "securities" in the Colonies, &c., is to be computed on the sums which have been, or will be, received in Great Britain in the current year.

A mutual life assurance society with its head office in Edinburgh, and where its management was exclusively vested in directors, sent to Australia for investment down to the end of 1898 a total sum of 1,504,000*l.* The total remittances made to this country to the same date was 716,500*l.*, while the total funds in Australia, including accumulated interest and deducting all Australian expenses to the same date, was 1,822,207*l.* The funds still remaining in Australia thus exceeded by 318,207*l.* the sums sent there for investment. The amount remitted to this country from

(1) (1827) 2 W. & S. 542. (2) (1840) 8 Cl. & F. 264; 54 R. R. 57.

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Australia in 1898 was 217,350*l.* All this except 5000*l.* was intermixed with the society's funds in Australia, and the society did not shew in their statement that the balance of 212,350*l.* was in fact capital sent home:—

Held, affirming the decision of the First Division of the Court of Session, that the Income Tax Commissioners had rightly charged the 212,350*l.* with income tax.

APPEAL from the First Division of the Court of Session (sitting as the Court of Exchequer), Scotland. (1) The following is a summary of the facts stated in the special case.

The appellants were a mutual life assurance society established in 1837. The head office of the appellants was in Edinburgh, and its management and administration were wholly vested in a board of directors established there. By the appellants' act of incorporation the society was entitled to carry on the business of effecting assurances on lives in all its various branches in any part of the United Kingdom and elsewhere. By its articles of constitution, amended in 1894, the directors were given the power to appoint agents in all parts of the United Kingdom, the Colonies, and elsewhere, but no agents were to be entitled to subscribe policies or grant receipts for contributions, or in any way bind the society. Notwithstanding these powers, the appellants had no agents outside the United Kingdom other than those employed in the investments of a portion of its funds. By the society's Act of 1884 the society had power to lend out its funds in various countries outside the United Kingdom. The appellants had representatives in Melbourne charged with the management of Australian investments, all which proposed investments had first to be submitted to the appellants in Edinburgh. Before 1885 the appellants had no funds in Australia, but in that year they began to remit large sums from this country for the purpose of meeting loans made in Australia; all sums so remitted were against specific investments, and were so marked at the time. No sums were remitted from this country after 1890. The interest accruing on Australian investments prior to 1893 was not brought home, but was reinvested as the loans fell due. Up to December 31, 1898, the total amount sent out was 1,504,000*l.* The total amount of interest from funds in Australia, after deducting all

(1) (1901) 3 F. 874.

expenses to the same date, was 1,034,707*l.*—that is, a total capital and interest of 2,538,707*l.* The total remittances from Australia to the same date was 716,500*l.*, leaving a fund there of 1,822,207*l.* The sum of 716,500*l.* was sent home as follows: In 1893, 32,000*l.*; in 1895, 115,000*l.*; in 1896, 101,000*l.*; in 1897, 251,150*l.*; in 1898, 217,350*l.* It is upon this sum of 217,350*l.* that the assessment the subject of this appeal has been made. The appellants objected to the assessment on the ground that the 217,350*l.* represented capital sent home, and not interest or profit on investments. The following table shews how the sum of 217,350*l.* was made up:—

No.	Remittances for Investment.		Repayments of said Investments.		Remittances from Australia.	
	Date.	Amount.	Date.	Amount.	Date.	Amount.
	1886.	£	1891.	£	1898.	£
1	May 21	25,000	June 1	25,000	Feb. 1	25,000
2	Oct. 23	10,000	Oct. 14	10,000	Feb. 1	10,000
3	Aug. 5	25,000	Aug. 5	5,000	Feb. 1	9,000
			1896.			
			Nov. 5	4,000		
	1888.		1894.			
4	Jan. 19	100,000	July 25	25,991	April 13	35,000
			1895.			
			Jan. 21	39,859	May 17	20,850
					Sept. 7	10,000
	1886.		1898.			
5	Aug. 11	70,000	May 12	5,000	May 12	5,000
			1897.			
6	April 15	37,500	Aug. 6	37,500	Sept. 7	37,500
	1880.		1898.			
7	April 30	100,000	April 30	25,000	Sept. 7	7,500
					Nov. 2	17,500
	1900.		1898.			
8	Sept. 22	30,000	Mar. 24	6,000	Nov. 2	6,000
	1887.		1896.			
9	June 23	6,000	Dec. 24	6,000	Nov. 2	6,000
	1888.		1898.			
10	Nov. 14	28,000	Nov. 14	28,000	Nov. 16	28,000
						£217,350

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When the repayments mentioned above were made (with the exception of No. 5), they were paid into the appellants' banking account kept by the appellants' representatives in Australia, which account would at the same time contain other sums of money, which other sums may or may not have included interest. As will be seen from the above table, very considerable periods elapsed between the dates when the repayments were made in Australia and the remittances sent home. Where there were such considerable periods fresh investments had been made by drawing upon the said banking account. It was an instruction from the appellants to their Australian agents that remittances sent home should be against sums sent from this country, and accompanying all remittances home except No. 5 the said agents sent letters of which the following paragraph from the letter accompanying No. 1 may be taken as a sample: "For your guidance in dealing with the Inland Revenue Department, the above amount represents proceeds of the draft, 25,000*l.*, drawn by the attorneys of the institution on May 21, 1886." And each letter was headed with the name of the particular borrower for whom the remittance from this country to the appellants' agent in Australia was originally sent. With regard to No. 5, the sum of 5000*l.*, in part payment of the principal debt of 70,000*l.*, was cabled direct by the borrower's solicitor to the appellants, and therefore was not paid through the Australian agents. This sum the Court of Session struck out of the assessment; but their Lordships affirmed the assessment on the balance of 212,350*l.* (1) The whole of the appellants' income in Australia was interest arising from their securities there. This interest whether brought home or not was regularly included in the appellants' accounts as part of its income, and so far as received or accrued up to December 31, 1894, the date of the last septennial investigation, was duly taken into account in arriving at the surplus divisible among the members by way of bonus or otherwise. Interest received since 1894 contributes to the surplus to be dealt with at the next investigation.

(1) 3 F. 874.

Haldane, K.C., and *Blackburn* (of the Scottish Bar), for the appellants. The appellants are not liable to be assessed on any of the sums sent home from Australia during the year 1898: these sums were attributed only to sums lent, that is returned capital. In some cases the remittance of the money to this country followed so closely on the repayment of the loan that there can be no question as to the source from which it had been received: see No. 10 in the above table. Undoubtedly this sum had been for two days intermingled with other moneys in the appellants' Australian banking account; but that fact does not affect the actual identification of the sum remitted with that originally loaned out. In other cases the remittance might not have followed so immediately on repayment; but as long as the appellants had any sums in Australia which had been originally sent out from this country, and which owing to the repayment of the original loan were available, they were entitled to treat all remittances as the return of sums originally sent out, and not as remittances of income. There is no authority for the converse of this proposition as stated by the respondent, namely, that so long as the appellants had in Australia any invested sums made up of accumulations of interest earned in Australia all remittances to this country must be treated as remittances of interest. The proper subject of the tax was profits received and treated in this country as such, and not capital from whatever source it might be derived. The result of the contention of the respondent, if affirmed, would be that unless the appellants were to withdraw all their sums from Australia they could never bring home the capital sum sent out without paying income tax on it when received. The Income Tax Acts expressly recognise the appellants' right to retain interest earned abroad, and it was in exercise of that right that they directed their agents to be careful not to send over interest, but specific capital. Suppose the appellants had sent out 100,000*l.* to be lent, and another sum of 5000*l.*, and there was a profit on the 100,000*l.* of, say, 5000*l.*, which was kept in Australia in a separate bank, and that was never brought back. Then, supposing the 5000*l.* loan was repaid and sent back, can the 5000*l.* sent back be said to be subject

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to income tax as interest or profit? There is no doubt that the appellants only sent out originally 1,504,000*l.*, and they have in Australia now 1,822,207*l.*—that is, that they have interest over and above capital amounting to over 300,000*l.*; but they have never brought home any interest. The question here is between the Crown and the appellants, an assurance society. The appellants have the right to do what they like with their own money, and there is no presumption, as held by the Court of Session, that the sums of money remitted were interest. The business of the appellants is that of a mutual life assurance society, which differs from an ordinary trading company in respect that they have not got a separate capital and income account applicable to different purposes. Everything the appellants receive either in this country or abroad goes to form a common fund. When, therefore, the directors have any payment to make, the payment can be legally made out of the first and readiest money which comes to their hands. Accordingly, the repaid loans or the interest would be applicable in this country to any purpose for which money was required. On the second point the Commissioners took the year 1898 for convenience; but the above table shewed that the sums sent home were out of accumulations on interest of previous years. The utmost the appellants should be assessed on is a sum of about 88,000*l.*

[EARL OF HALSBURY L.C. That second point is not now open to argument; it should have been raised before the Courts below.]

[They cited *Gresham Life Assurance Society* v. *Bishop*. (1)]

Sir Robert B. Finlay, A.-G., Scott Dickson, Solicitor-General for Scotland, and *Young* (the two latter of the Scottish Bar), appeared for the respondent, but were not called upon.

EARL OF HALSBURY L.C. My Lords, so far as I am concerned I think this is really a question of fact. The question is what inference can properly be drawn from the facts as stated by the Commissioners.

The broad facts, and the only facts I shall consider, are

(1) [1902] A. C. 287.

these: this is a large amount of money which has been sent to this country; it has been sent to this country from investments made abroad—that is to say, made in Australia. I cannot appropriate, nor do I think the parties probably could appropriate, without the assistance of an actuary, the exact amount earned by each particular investment, and say what should be properly applied to capital and what to income. The Commissioners have had the matter before them, and they have come to the conclusion that such and such an amount is the amount which they would appropriate to the interest which has been received. It appears to me that we are rather misplacing the burden of proof. A large amount out of profits has been remitted to this country. If that remittance is all profit, then income tax is payable upon it. If the parties would be able to shew that some part of it ought to be appropriated to capital, and if they could make it apparent that the money which was received in this country was not at all profit, but was simply a repayment of capital, I think it is for them to shew that. Primâ facie this remittance is a large amount of profit (looking at the figures) made by this trading company. It is a mutual company, no doubt, but that only affects the question what you will do with the profits when you have got them.

The next question is, whether or not, though earned abroad, the profits have been brought to this country. Here is a large sum sent back. Putting these items together, they must include, and obviously do include, a large amount of profits. It is for the company to shew, if the fact be so, that that remittance ought to be subject to a certain amount of deduction, because a good deal of it was repayment of that which was in truth capital and not profit at all. No attempt has been made to do that, but what has been done in lieu of that is to write out to the local agents and say, "Whenever you send money to this country, do not find out what in strictness is the difference between capital and income, but describe whatever you send back to us as repayment of capital—take care you do not describe it as interest." It is obvious that the mere nicknaming the sum received, and ascribing to it because it is so

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named the character of capital and not of income, cannot defeat the right of the Crown to have the tax levied upon that which in substance is profit earned abroad but brought to this country.

For these reasons, my Lords, I am of opinion that the judgment of the Court below was right and that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD SHAND. My Lords, I agree that the decision of the Court of Session ought to be adhered to.

The question is, as your Lordship has put it, entirely one of fact. The amount of money which was sent out by the company as capital remains in Australia. It has been gradually increased and not diminished, and that amount of money still remains there. The company, in short, still has in Australia the capital which they sent out. The moneys that have come home were I think, therefore, as a matter of fact, interest or profits on capital, and I do not think that the mere circumstance of there being such letters as are here founded upon (and were arranged, if possible, to avoid income tax), representing the profits as capital though they were really interest, can have that effect.

LORD DAVEY. My Lords, I agree in the motion proposed, and I agree with what has been said by my noble and learned friends that this is a mere question of fact. I should like to ask what facts we have before us from which we can draw our inference. We have this fact (I will use round numbers, because the exact amount is not important), that by the end of the year 1898, before December 31, this company had remitted to Australia, for the purpose of investments on mortgages there, a sum of one and a half millions, and at the end of the period in question—on December 31, 1898—they had over two and a half millions there. In every sense this is profit.

Now, my Lords, what is the profit made from, because I agree with what Mr. Haldane said, that under Sched. D you tax the interest received on securities? The profit is only the

interest received on the securities. There can be nothing else. That is the only source from which, from the nature of the business carried on, the profit is derived. Therefore I think the Crown is entitled to draw the inference, and your Lordships are entitled to draw the inference, that this extra sum of 1,034,707*l.*—I will call it an extra million—which existed at the end of the year 1898, did represent in one way or another moneys which had been received in respect of the interest derived from the securities on which the original million and a half had been invested.

My Lords, the whole of the case of Mr. Haldane's clients, the assurance company, rests upon this table on p. 6 of the case. (1) Now what do we find in it? I will take the very first entry. We find that on February 1, 1898, the agent of the company in Australia remitted to this country a sum of 44,000*l.* We are told that that was a remittance of four sums of capital which had been received by the agents in Australia at four different times—three of them in the year 1891 and the other in the year 1896. This is obviously mere book-keeping and does not represent actual facts. The mere calling it capital for the purpose of the Inland Revenue Department will not make into capital that which is essentially and in truth profit—and a profit made by the interest received on the securities.

My Lords, the other question, which was raised by Mr. Blackburn, I do not treat as being before us, and I express no opinion upon it. All the parties seem to have agreed that the question of whether this sum of 217,350*l.* represented interest or capital was the question for decision, and upon that point I have no hesitation in saying that I agree entirely with the judgment of the Inner House.

LORD ROBERTSON. My Lords, the circumstance that for convenience the year 1898 was inquired into instead of 1899 does not affect the question before the House, for the parties accepted the figures so reached as applicable to the year of assessment.

(1) Ante, p. 131.

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Lord Robertson.

The question then is, Was this sum of 212,000*l.*, which admittedly was remitted, profits or gains of the year? As the whole money remitted came out of a bank account it is impossible to identify the money, and the facts of the case must furnish the inference. On this question of fact it seems to me that the judgment of the Court of Session is clearly right. First of all, there is the fact of remittance in two consecutive years; for the year 1898 is taken as fairly representing the year 1899. There is no suggestion that any exceptional reason required remittances of capital in either year or in both. On the other hand, it is certain that the amount of invested capital left behind in the Colony, after these remittances, is larger than before; so that the capital is fully accounted for. Well, then, what it done with this so-called capital remitted? The answer is, exactly what would be done with profits. The inference from these facts is that the moneys remitted were in fact profits, and, in the absence of anything to the contrary, profits of the year in which they were remitted.

Ordered that the appeal be dismissed with costs.

Lords' Journals, April 30, 1903.

Agents for appellants: *Grahames, Currey & Spens, for Dundas & Wilson, C.S., Edinburgh.*

Agent for respondent: *Francis C. Gore, for Philip J. Hamilton Grierson, Inland Revenue.*

[PRIVY COUNCIL.]

WISE . . . . . APPELLANT;

AND

PERPETUAL TRUSTEE COMPANY, LIMITED . . . . . RESPONDENTS.

J. C.*
1902
Nov. 27, 28; *Dec.* 13.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Principle upon which Clubs are founded — Liability of Trustees of Club in respect of Leases—Liability of the Members of a Club.

The rule that trustees are entitled to be indemnified by their cestuis que trustent against liabilities incurred by their holding trust property does not apply to cases where the nature of the transaction excludes it.

An ordinary club is formed upon the tacit understanding, judicially recognised, that no member as such becomes liable to pay to its funds or otherwise any money beyond the subscriptions required by its rules.

Trustees of a club who have incurred liability under onerous covenants contained in a lease, accepted by them on its behalf, are entitled to indemnity out of any property of the club to which their lien as trustees extends. Its members are not, by reason only of being cestuis que trustent, personally liable to indemnify them, where there is no rule imposing such liability upon them.

APPEAL from an order of the Supreme Full Court (July 23, 1900) affirming an order made by the Chief Judge in Equity (March 5, 1900).

The question involved in the appeal is whether the appellant, who was a member of a club in Sydney called the Cercle Français, is, in common with other members thereof, liable under the circumstances stated in their Lordships' judgment to indemnify the estate of William Henry Paling in respect of rent and other moneys and liabilities paid and incurred by the said Paling or his executors under a lease which he and others, as trustees for the said club, took of the club premises.

The proceedings in the suit brought by the respondents to enforce the above liability are sufficiently detailed in the judg-

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR FORD NORTH, SIR ARTHUR WILSON, and SIR JOHN BONSER.

J. C. 1902 WISE v. PERPETUAL TRUSTEE COMPANY.

ment of their Lordships; and may also be read in N. S. L. R. 19 Eq. 177. The decree made therein on October 27, 1898, which was not appealed from, declared the basis of the liability to be enforced, namely, that those members who had assented to and ratified the taking of the lease were liable to indemnify the trustees. It then referred it to the master to report as to the amount necessary to be raised to meet it, and what persons were liable to contribute thereto. The appellant was thereupon served with a notice that, unless he objected by affidavit, his name would be settled on the list of contributories.

The master found that the appellant joined the club in July, 1886, and remained a member to the last, and after reviewing the evidence he came to the conclusion that his acts, taken in connection with the fact that he continued to remain a member, amounted to a ratification of the action of the trustees in taking the lease.

The Chief Judge affirmed the finding. He found that the appellant knew of the liabilities of the club, including the liability of the trustees under the lease, and encouraged members to carry on the club, in the hope that it would tide over its temporary difficulties, and that by the club carrying on till February, 1891, the trustees were encouraged to retain an onerous asset which otherwise they might have got rid of; and he was of opinion that that fact, coupled with the fact of the appellant remaining a member of the club and taking no steps to shew that he in any way disapproved of the new premises being taken for the club, was sufficient to render the appellant liable to indemnify the trustees.

The Full Court affirmed this order. The Chief Justice and Cohen J. found that the appellant must be taken to have known the premises he enjoyed as a club to be leasehold, and was put upon inquiry and could have ascertained the terms of the lease and the extent of the liability of the trustees, and must be taken to know that so long as he remained a member he was bound in common with all other members to indemnify the trustees; that after the decree of October 27, 1898, the question as to whether membership alone was sufficient to impose liability on persons who were members at the date of

the meeting of January 13, 1888, was still open for consideration; that by the rules of the club the property of the club was made the property of the members, so that the lease, which might be a valuable asset, belonged to them, and they knew it was by the rules vested in the trustees upon trust for them; and that every circumstance in the case was such as to put the appellant upon inquiry as to the extent of their interest in the property of the club, and what the property was which the trustees held on their behalf; and they decided that the fact of membership on July 12, 1888, taken alone, and still more in connection with his subsequent conduct, was sufficient to impose liability upon all persons who were members of the club at the date of the winding-up, and who had not been exonerated by the said decree.

Owen J., who differed, did so on the ground that the appellant could not be held to have ratified the lease, and was not present at the meeting when the transaction of lease was decided on.

Scott Fox, K.C., and *Spearman*, for the appellant, contended that the certificate declaring him liable to indemnify the respondents should have been set aside. The appellant had always been willing to share with all the other members of the club the liabilities under the lease. But he objected to take upon himself an individual liability not shared by most of the members. The form of the suit and the declarations in the decree rendered only four or five persons liable to make good a sum which with costs amounted to over 5000*l*. He contended that the evidence given of his acts did not amount in law or in equity to a ratification by him of the action of the trustees in taking the lease of the premises. Whatever he had done, he did in the belief that the statements contained in the circulars of June 9 and June 21, 1890, were true, whereas they contained misstatements of fact. Upon the general law as to the liability of members of clubs, and also of cestuis que trustent for the acts of their trustees, see *Perpetual Trustee Co.* v. *A'Beckett* (1) and cases there cited; *Ex parte Chippendale* (2); *In re St.*

(1) (1899) 19 N. S. L. R. 176, 186. (2) (1854) 4 D. M. & G. 19.

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James' Club (1); *Minnitt* v. *Lord Talbot* (2); *Phosphate of Lime Co.* v. *Green.* (3)

Haldane, K.C., and *C. James*, for the respondents, contended that the judgments of the Courts below were right. The taking of a lease for club purposes was a necessary or reasonable act within the scope of the trust reposed in trustees of a club. Further than that, the meeting of January 13, 1888, by which the proceedings of the meeting of December 9, 1887, were confirmed, authorized the taking of the lease, and made it within the scope of the trust. The true inference to be drawn from the evidence is that the appellant assented to and ratified the action of the trustees in taking the lease, so far as any ratification was necessary. [LORD MACNAGHTEN. Can members of a club be held liable to indemnify trustees in any action they may enter into, when there is no rule of the club to that effect? It is a liability not contemplated by them.] Reference was made to the circular of June 21, 1890. In the circumstances of this case the taking of the lease by the trustees, even without any specific authority from a general meeting, was within the scope of their trust. And the adoption or confirmation of the minutes of an invalid meeting ratified them: *In re Portuguese Consolidated Copper Mines, Limited.* (4) Reference was made to the rules of the club to shew that they contemplated the liability sought to be enforced.

The appellant's counsel were not heard in reply.

1902 *Dec.* 13.

The judgment of their Lordships was delivered by

LORD LINDLEY. This appeal raises the extremely important question whether the members of an ordinary club are personally liable to indemnify the trustees of the club against liabilities incurred by them as such trustees, and where there is no rule imposing such liability.

The undisputed facts are shortly as follows:—

In the year 1886 certain persons, including a Mr. Paling, now deceased, formed a club in Sydney, New South Wales,

(1) (1852) 2 D. M. & G. 383.
(2) (1876) L. R. Ir. 1 Ch. 143; S.C. L. R. Ir. 7 Ch. 407.
(3) (1871) L. R. 7 C. P. 43.
(4) (1890) 45 Ch. D. 16.

which was known as the Cercle Français. The appellant became a member of the club in July, 1886, and remained a member of the club until its dissolution. In January, 1887, the club adopted certain rules, the 12th and 17th of which were as follows :—

"(12.) The administration of the affairs of the club is entrusted to a committee elected at the first general meeting in each year. The duties of the members of the committee are purely honorary."

"(17.) The committee disposes of the funds of the society, and has full power to take all measures for the internal management which it may deem necessary."

Between July and December, 1887, it was considered by some members of the club that the premises then occupied by the club at No. 50, Wynyard Square were too small, and steps were taken to provide increased accommodation. A general meeting was called to consider the subject, and a meeting was held on December 9, 1887. Too few members attended to bind the club; but the subject of obtaining a lease of new premises of the club was discussed, and the members present resolved that the matter be left in the hands of M. Lachaume, the president of the club, to make the best arrangements in the interests of the club, and the said Lachaume and the said W. H. Paling and Messrs. Doublet and Van de Velde were appointed trustees of the club.

A general meeting of the club was held on January 13, 1888, at which the minutes of the meeting of December 9, 1887, were read and confirmed.

On July 12, 1888, the above-mentioned Messrs. Paling, Lachaume, Doublet, and Van de Velde became lessees of certain premises known as 50, Wynyard Square and 9, Wynyard Lane for a term of ten years from July 9, 1888, at a rental of 555*l.* per annum, and subject also to certain onerous covenants set out in the said lease. After the execution of this lease the above-mentioned premises were used for the purposes of the club, and the club remained in possession thereof until it was dissolved.

In July, 1888, after the execution of the lease, the old rules

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of the club were repealed and new rules were adopted. The 3rd, 4th, 14th, and 15th were as follows:—

"(3.) The property of the club, subject to the liabilities thereof, shall belong to the members for the time being.

"(4.) No member shall, by reason of his membership, have any transmissible or assignable interest, by operation of law or otherwise, in any of the property of the club. On any member ceasing, by death, resignation, or otherwise, to be such, all his interest shall survive, accrue, and belong to the other members for the time being."

"(14.) The affairs of the club shall be under the management of the following office-bearers, namely, a president, vice-president, four trustees, a committee, and a treasurer.

"(15.) All purchases, investments, leases, conveyances, securities, or contracts by, to, or on behalf of the club shall be made, taken, or entered into in the names of the trustees. All the real and personal property of the club shall be vested in, and shall be held by them upon trust for, the members for the time being, and shall (except as to the real property) be subject to the disposition of the committee, whose order, certified in writing under the hand of the chairman of the day and attested by the secretary, shall be obligatory upon and a justification to the trustees as to making, taking, or entering into any such purchase, investment, lease, conveyance, security, or contract, or any disposal of any personal property vested in them as such trustees. And the orders of the committee, certified in like manner as to any purchases necessary for carrying on the internal management of the club, shall also be obligatory upon and a justification to the trustees for making the same. The real property of the club shall not be dealt with, except by the resolution of a general or special general meeting of the members of the club."

The rules prescribed the entrance fees and subscriptions, but there was no rule imposing any liability on any of the members to pay more.

The club continued to exist until February, 1891, when it was dissolved. It had eighty members when the lease was obtained, and ninety more joined afterwards.

In April, 1891, the above-mentioned lessees sublet the premises comprised in the lease of July 12, 1888, to the Cosmopolitan Club Company for the unexpired portion of the ten years' term less one day, the underlessees covenanting to pay the same rent and perform the lessees' covenants. The Cosmopolitan Club Company remained in possession until January, 1894, and paid the rent up to that date, when they went into liquidation. The lessees then re-entered into possession of the premises, and from time to time relet them, giving the club the benefit of all rentals received. Finally all the trustees except the said William Henry Paling, being unable to pay the rent, the said Paling in his lifetime, and his executors (the respondents to this appeal) after his death, paid under the lessees' covenants various sums amounting in the aggregate to 2350*l.* or thereabouts in excess of moneys received by them by sub-letting the premises.

On April 22, 1897, the executors of the said William Henry Paling, deceased, filed a statement of claim in an action in the Supreme Court of New South Wales in Equity against certain members of the club selected to represent them all, and the plaintiffs prayed as follows :—

"(1.) That it may be declared that all persons who were members of the said Cercle Français on the 12th day of July, 1888, and all persons who became members of the same Cercle Français subsequent thereto, and the personal representatives of any of such persons respectively who are now deceased, became and are jointly and severally liable to contribute to and indemnify the plaintiffs and the estate of the said William Henry Paling against the rent paid and expenses incurred by the said William Henry Paling during his lifetime, and by the plaintiffs since his death, in respect of the said lease and the covenants thereof, and the future rent and expenses to which the plaintiffs, as executors of the said William Henry Paling, are or may become liable under the said lease and the covenants thereof, and that the defendants, and all such other persons and representatives as respectively aforesaid, may be jointly and severally decreed to repay to the plaintiffs and indemnify them against such rent and expenses, with interest on the

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same at such rate as this Honourable Court shall direct, and also to pay the plaintiffs' costs of suit.

"(2.) That an account be taken under the direction of this Honourable Court of the rent and expenses respectively aforesaid.

"(3.) That an inquiry may be directed as to the persons constituting the said several classes of members, and whether any and which of such persons are dead; and, if so, who are their respective legal personal representatives."

The appellant was not a party to the said suit, nor was he served with notice of the said statement of claim nor of the proceedings therein. In the statement of claim the plaintiff set out the various classes of members which each defendant was to represent. They were as follows:—

(i.) a'Beckett as representing members of the committee at the time of the making of the lease.

(ii.) Fesq as representing members of the club present at the general meeting of January 13, 1888.

(iii.) Burne as representing members at the time when the lease was made, but who were not present at the meeting of January 13, 1888.

(iv.) Woolcott-Waley as representing members of the committee at a date subsequent to the lease being made.

(v.) Henderson as representing the members of the club elected at a date subsequent to the date of the lease.

On May 25, 1897, Manning, Chief Judge in Equity, made an order authorizing the above-mentioned defendants to defend the proceedings respectively on behalf of the above specified classes. The appellant was not served with and was no party to the said order.

On October 27, 1898, Simpson, Chief Judge in Equity, made a decree dismissing the suit against the defendants Woolcott-Waley and Henderson with costs, and declaring (inter alia) that the defendants a'Beckett, Fesq, and Burne, and all other persons who were members on July 12, 1888, and who assented to or subsequently ratified the action of the trustees of the club in taking the lease of that date, are and each of them is bound to indemnify the late William Henry Paling and his estate against

the rent and other moneys paid by the said William Henry Paling or his executors under the said lease. By the said order it was further decided that the Master in Equity should inquire as to which persons were liable to contribute on the basis of the above decree.

On August 5, 1899, the defendants gave notice to the appellant that the Master in Equity was proceeding to settle the said list, and that the appellant's name had been submitted to the master for inclusion therein.

On August 25, 1899, the appellant filed an affidavit objecting to his inclusion in the said list, and on November 21, 1899, the appellant filed a notice of further objections.

In November, 1899, evidence was taken upon the said matter, and the master found that the appellant had assented to or ratified the action of the trustees in taking the lease, and that he ought to indemnify the plaintiffs with costs to be taxed; and on December 15, 1899, the master made a separate certificate to that effect. On February 15, 1900, the appellant took out a summons to vary the master's certificate. The said summons was heard by the Chief Judge in Equity; and on March 5, 1900, the said summons was dismissed with costs.

On March 19, 1900, the appellant filed a notice of appeal against the said order to the Full Court; and on July 23, 1900, the said appeal was dismissed with costs.

The present appeal is from these last orders. There is no appeal from the decree of October 27, 1898. In the case lodged by the appellant he stated, and his counsel repeated before their Lordships, that the appellant was always willing to share with all the other members of the club the liabilities under the said lease, but as the form of the suit and the declarations in the decree rendered only four or five persons liable to make good a sum which (by the addition of costs) amounted to over 5000*l*., he objected and objects to take upon himself an individual liability not shared by other members of the club.

The decree of October 27, 1898, was not made upon the broad ground that the members of the club as cestuis que trustent were bound to indemnify their trustees; it was made upon the theory that only those members of the club were

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liable to indemnify the plaintiffs who had assented to or ratified the taking of the lease; and the master's certificate found that the appellant had assented to and ratified it. The Chief Judge refused to vary the certificate, thinking it right. The Full Court, on appeal, affirmed the decision, but not unanimously, nor on the same grounds. The Chief Justice considered it proved that the appellant had become one of the cestuis que trustent of the lease, and was, therefore, liable to indemnify the plaintiffs. Cohen J. considered that the appellant had assented to and ratified the taking of the lease, and had, therefore, become liable. Owen J. differed. He thought the master's certificate wrong, and that the appellant ought to succeed.

With respect to the appellant's assent or ratification to the taking of the lease, much discussion took place as to what was meant in this case by ratification, and it was contended that no ratification, as distinguished from approval, could be established. It is not, however, necessary to do more than to say that it became plain to their Lordships when the evidence had been examined that, although there was ample evidence to prove that the appellant knew that a lease had been taken for the club, and that the club had the use of the property, and that the lease might become a burden to the club, yet that the appellant had done nothing whatever to incur any liability to indemnify the trustees, unless such liability attached to him as a member of the club and as one of the cestuis que trustent of the lessees. It further appeared to their Lordships to be proved that, notwithstanding the irregularities of the meeting of December, 1887, and the doubts thrown on the legal validity of its subsequent confirmation, yet that the members of the club generally and the appellant with the others, through the committee of management and otherwise, so far assented to what had been done as to have become cestuis que trustent of the lessees. Their Lordships were satisfied that the relation of trustee and cestui que trust had been created. It follows from this that the lessees as trustees were entitled to be indemnified out of any property of the club to which their lien as trustees extended. But the evidence against the appellant did not

prove anything more than the existence of the above relation; and their Lordships intimated that in their opinion the real question for decision was whether the appellant was liable to indemnify the trustees under the circumstances thus proved. This view was ultimately accepted by counsel, and their Lordships do not, therefore, think it necessary to allude further to the evidence on the present occasion.

In *Hardoon* v. *Belilios* (1) this Board had to consider the right of trustees to be indemnified by their cestuis que trustent against liabilities incurred by the trustees by holding trust property. The right of trustees to such indemnity was recognised as well established in the simple case of a trustee and an adult cestui que trust. But, as was then pointed out, this principle by no means applies to all trusts, and it cannot be applied to cases in which the nature of the transaction excludes it.

Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognised. It has been so recognised in actions by creditors and in winding-up proceedings: see *Flemying* v. *Hector* (2); *St. James' Club*. (3)

Apart from an observation of Lord St. Leonards in the last case, and which observation is in favour of the appellant, the only reported case in which a Court has had to consider the application to a club of this right to indemnity is *Minnitt* v. *Lord Talbot*. (4) In that case some members of a club, who had guaranteed the repayment of money borrowed for the club, sought indemnity, not only out of the property of the club, but from the members personally. The Court, which had already

(1) [1901] A. C. 118.
(2) (1836) 2 M. & W. 172.
(3) 2 D. M. & G. 383.
(4) L. R. Ir. 7 Ch. 407.

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given effect to their lien (1), afterwards made an additional order and inquiry similar to those made in this case. The grounds upon which this addition to the original decree was made do not appear; nor does it appear what were the grounds on which any member was held to have incurred liability, nor, indeed, whether any member had incurred such liability. This case does not, therefore, assist their Lordships on the present occasion.

The question now to be decided may be regarded as not yet covered by authority; and a choice must be made between either ignoring the essential features of a club or holding that the general rule established in *Hardoon* v. *Belilios* (2) is inapplicable to such a body of persons. Their Lordships feel no difficulty in making this choice. The trustees of a club are the last persons to demand that the fundamental conditions on which their cestuis que trustent have become such shall be completely ignored.

The appellant in this case is not, in their Lordships' opinion, under any legal or equitable obligation to pay or contribute anything towards the indemnity of the plaintiffs; but he has offered to do so, and the plaintiffs are not satisfied with his offer. Their endeavour to obtain more is to be regretted, and cannot succeed. This may seem hard on the trustees; but they have only themselves to blame for their own imprudence in not seeing to their own safety. A decision in their favour would not only be hard on the members of the club, but would be inconsistent with the terms on which they became members.

Their Lordships will, therefore, humbly advise His Majesty to set aside the certificate of the master and to reverse the orders of March 5, 1900, and July 23, 1900, with costs.

The respondents will pay the costs of the appeal.

Solicitor for appellant: *George Slade.*

Solicitors for respondents: *Kimbers & Boatman.*

(1) L. R. Ir. 1 Ch. 143.

(2) [1901] A. C. 118.

[PRIVY COUNCIL.]

CUNNINGHAM AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . } APPELLANTS;

AND

TOMEY HOMMA AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENTS.

J. C.* 1902 July 4; Dec. 17.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British North America Act, s. 91, sub-s. 25; s. 92, sub-s. 1—Naturalization and Aliens—British Columbia Provincial Elections Act, s. 8—Powers of Provincial Legislature—Privileges conferred or withheld after Naturalization.

Sect. 91, sub-s. 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted.

The provincial legislature has the right to determine, under s. 92, sub-s. 1, what privileges, as distinguished from necessary consequences, shall be attached to it.

Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not ultra vires.

APPEAL from an order of the above Supreme Court (March 9, 1901) affirming an order of the Chief Justice, sitting as county court judge (Nov. 30, 1900), which reversed the decision of the collector of voters, and ordered that the name of Tomey Homma be placed on the register of voters for the Vancouver electoral district.

In October, 1900, the said T. Homma, a native of the Japanese empire, not born of British parents, but a naturalized British subject, by notice given in the prescribed manner to the appellant, made the application now in question.

By the Provincial Elections Act of British Columbia (Revised Statutes of British Columbia, 1897, c. 67) it is enacted (amongst other things) as follows:—

"3. The following terms shall in this Act have the

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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meanings hereinafter assigned to them unless there is something in the context repugnant to such construction, that is to say—"

* * * * *

"The expression 'Chinaman' shall mean any native of the Chinese empire or its dependencies not born of British parents, and shall include any person of the Chinese race naturalized or not.

"The expression 'Japanese' shall mean any native of the Japanese empire or its dependencies not born of British parents, and shall include any person of the Japanese race naturalized or not.

"The expression 'Indian' shall mean any person of pure Indian blood."

* * * * *

"7. Every male of the full age of twenty-one years, not being disqualified by this Act or by any other law in force in this province, being entitled within this province to the privileges of a natural-born British subject, having resided in this province for twelve months, and in the electoral district in which he claims to vote for two months of that period immediately previous to sending in his claim to vote, as hereinafter mentioned, and being duly registered as an elector under the provisions of this Act, shall be entitled to vote at any election: provided that no person shall be entitled to be registered or to vote as aforesaid who shall have been convicted of any treason, felony, or other infamous offence, unless he shall have received a free or conditional pardon for such offence, or have undergone the sentence passed upon him for such offence.

"8. No Chinaman, Japanese, or Indian shall have his name placed on the register of voters for any electoral district, or be entitled to vote at any election. Any collector of voters who shall insert the name of any Chinaman, Japanese, or Indian in any such register shall, upon summary conviction thereof before any justice of the peace, be liable to a penalty not exceeding $50."

By the Provincial Elections Act Amendment Act, 1899

(Statutes of British Columbia, 1899, c. 25), it is enacted (amongst other things) as follows:—

"3. Section 7 of said chapter 67 is hereby amended by striking out the word 'twelve' in the fourth line thereof and substituting therefor the word 'six,' and by striking out the words 'two months' in the fifth line thereof and substituting therefor the words 'one month,' and by adding thereto as sub-s. 2 thereof the words following:—

"2. No judge of the Supreme or County Court, no sheriff or deputy sheriff, no employee of the provincial government who is in receipt of salary of at least $300 per annum, no sailor, marine, or soldier on full pay in the Imperial service, and no officer in the Imperial service on full pay, shall be entitled to have his name placed upon the register of voters for any electoral riding. This sub-section shall not apply to Ministers of the Crown, Mr. Speaker, members of the Legislative Assembly, or school teachers."

On October 19, 1900, the appellant, in obedience to s. 8 of the said Provincial Elections Act, disallowed the claim of Tomey Homma.

The County Court and the Supreme Court held that s. 8 of the Provincial Elections Act of British Columbia related to a matter, namely, "naturalization," which, by virtue of the British North America Act, 1867, s. 91, was within the exclusive legislative authority of the Parliament of Canada, and not within the jurisdiction of the legislature of British Columbia.

Robinson, K.C., and *C. A. Russell, K.C.*, for the appellants, the Attorney-General for the province having been joined as an intervenor with the collector, contended that the orders of the County and Supreme Courts were wrong, and should be reversed. They contended that it should be declared that Homma was not entitled to be placed on the register of voters. Sect. 8 referred to was not within the exclusive legislative authority of the Dominion. It does not relate to any matter declared by s. 91 of the British North America Act, 1867, to belong to the Dominion jurisdiction. See particularly sub-s. 25,

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which relates to naturalization and aliens—that is, to the mode in which naturalization is to be conferred, not to the rights which may or may not follow according to the electoral law of the district. That is a matter which is within the exclusive competence of the provincial legislature, being within the classes of subjects assigned to it by s. 92: see sub-s. 1. It is the provincial, and not the Dominion, legislature which has power to regulate the electoral law of the province, and to decide whether the respondent, naturalized by force of the Dominion Act, shall have a right to vote at the elections of members to serve in the provincial legislature. Such a right is not inherent in the respondent either as British born or as a naturalized British subject. It is a right and privilege which belongs only to those classes of British subjects upon whom the provincial legislature has conferred it. Reference was made to *Union Colliery Co.* v. *Bryden* (1); *Fielding* v. *Thomas.* (2)

Blake, K.C., for the respondent (*Newcombe, K.C.*, and *Loehnis*, with him, for the Attorney-General for the Dominion), contended that s. 8 in question is in respect of the respondent ultra vires of the provincial legislature. It trenches on the subject of aliens and naturalization. It attempts to impose on naturalized aliens of the Japanese race, on the score of their alien origin alone, a perpetual exclusion from the electoral franchise. It does so in spite of their being entitled within the province to all the privileges of natural-born British subjects, and in spite of their fulfilling all the conditions under which natural-born British subjects are entitled to the franchise. It thus nullifies, as it were, the Dominion legislation on the subject. Provincial legislatures are limited to matters of local as distinguished from Imperial concern. This legislation is calculated to create difficulties between the British and Japanese nations; but at the same time it cannot be checked by Imperial authority, which has a veto on Dominion but not provincial legislation: see British North America Act, 1867, ss. 56, 90. The Act should be so construed as to maintain to the full all limitations on provincial power in respect of matters

(1) [1899] A. C. 580, 586. (2) [1896] A. C. 600.

affecting Imperial relations, and to retain them within the exclusive power of the Dominion.

Robinson, K.C., replied.

Dec. 17. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. In this case a naturalized Japanese claims to be placed upon the register of voters for the electoral district of Vancouver City, and the objection which is made to his claim is that by the electoral law of the province it is enacted that no Japanese, whether naturalized or not, shall have his name placed on the register of voters or shall be entitled to vote. Application was made to the proper officer to enter the applicant's name on the register, but he refused to do so upon the ground that the enactment in question prohibited its being done. This refusal was overruled by the Chief Justice sitting in the county court, and the appeal from his decision to the Supreme Court of British Columbia was disallowed. The present appeal is from the decision of the Supreme Court.

There is no doubt that, if it is within the capacity of the province to enact the electoral law, the claimant is qualified by the express language of the statute; but it is contended that the 91st and 92nd sections of the British North America Act have deprived the province of the power of making any such provision as to disqualify a naturalized Japanese from electoral privileges. It is maintained that s. 91, sub-s. 25, enacts that the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion, while the Naturalization Act of Canada enacts that a naturalized alien shall within Canada be entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in Canada. To this it is replied that, by s. 92, sub-s. 1, the constitution of the province and any amendment of it are placed under the exclusive control of the provincial legislature. The question which their Lordships have to determine is which of these two views is the right one, and, in determining that question, the policy or impolicy of such an enactment as that which excludes a particular race from

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the franchise is not a topic which their Lordships are entitled to consider.

The first observation which arises is that the enactment, supposed to be ultra vires and to be impeached upon the ground of its dealing with alienage and naturalization, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. The extent to which naturalization will confer privileges has varied both in this country and elsewhere. From the time of William III. down to Queen Victoria no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council.

In Lawrence's Wheaton, p. 903 (2nd annotated ed. 1863), it is said that "though (in the United States) the power of naturalization be nominally exclusive in the Federal Government, its operation in the most important particulars, especially as to the right of suffrage, is made to depend on the local constitution and laws." The term "political rights" used in the Canadian Naturalization Act is, as Walkem J. very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law ultra vires, such a construction of s. 91, sub-s. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to

what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

This, indeed, seems to have been the opinion of the learned judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Co.* v. *Bryden.* (1) That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.

For these reasons their Lordships will humbly advise His Majesty that the order of the Chief Justice in the county court and the order of the Supreme Court ought to be reversed, except so far as the respondent, Tomey Homma, is entitled to his costs under those orders. Having regard to the terms of the Order in Council giving special leave to appeal, their Lordships direct the appellants to pay the costs of Tomey Homma in this appeal, but that otherwise the parties shall pay their own costs.

Solicitors for appellants: *Gard, Rook & Winterbotham.*

Solicitor for respondent Homma: *S. V. Blake.*

Solicitors for Attorney-General for the Dominion: *Charles Russell & Co.*

(1) [1899] A. C. 587.

[PRIVY COUNCIL.]

J. C.*
1902
Nov. 25.
1903
Feb. 13.

THE KING . . . . . DEFENDANT;

AND

FISHER . . . . . PETITIONER.

THE KING . . . . . DEFENDANT;

AND

BULL . . . . . PETITIONER.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Petition of Right—Victoria Act No. 773 in 1883, s. 89—Construction—Rent not to be deducted from Salary where the Officer is entitled to Quarters.

Under s. 89 of Act No. 773 in 1883, re-enacted by s. 136 of Act No. 1133 in 1890, the power of the Government to make a deduction from an officer's salary for rent only exists where he has no right or title to quarters.

Where the appellant as postmaster of Geelong was compelled to reside upon Government premises for the performance of his duties there :—

Held, that the Government was not entitled to deduct 72*l.* for rent from his salary of 540*l.*, and it made no difference that the Appropriation Acts annually provided only 468*l.* to meet it.

So *held* also where the officer was governor of a gaol bound to reside in the quarters assigned, and the deduction of 70*l.* rent from his fixed salary of 570*l.*, on which his statutory pension was calculated, was carried out by an Order in Council fixing his salary at 500*l.* and silent about deductions.

THESE two appeals were heard together. Both were from judgments of the Full Court (May 27, 1901) dismissing appeals by the Crown from judgments of Holroyd J. (Nov. 19 and Nov. 5, 1900) in favour of the respondents upon petitions of right in which they were suppliants.

The petition in the first case in substance alleged that the suppliant had been postmaster at Geelong from a period before the 1st day of January, 1891, till the 31st day of December, 1896, and as such had been entitled to an annual salary of 540*l.*, of which he had been paid in each year 468*l.* and no

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR FORD NORTH, SIR ARTHUR WILSON, and SIR JOHN BONSER.

more, the difference amounting to 72*l.* per annum having been, as it was contended, illegally deducted as rent for residential premises at the post-office occupied by him. The suppliant claimed, under the circumstances stated in the judgment of their Lordships, that he was entitled to payment of 72*l.* for each of the six years above mentioned.

In the second case the petition in substance alleged that the suppliant had been from May 1, 1889, to July 30, 1890, governor of the Melbourne Gaol at a salary of 550*l.* per annum, and from July 30, 1890, to March 26, 1892, governor of the same gaol at the salary of 570*l.* per annum, and from March 26, 1892, to July 31, 1899, governor of the penal establishment, Pentridge, at a salary of 570*l.* per annum, but that he had been paid up to July 30, 1890, at the rate of 493*l.* 15*s.*, and from that day to July 31, 1899, at the rate of 500*l.* per annum only. The difference being 56*l.* 5*s.* per annum up to July 30, 1890, and 70*l.* per annum from that day to July 31, 1899, was alleged to have been illegally deducted as rent for residential premises occupied by the suppliant at the gaol and penal establishment of which he had successively been governor. The suppliant accordingly claimed payment for the sum so deducted, making in all 700*l.* 10*s.*

At the time of the first case Holroyd J. gave judgment for the suppliant on the authority of a decision of the Full Court (*Fisher* v. *Reg.* (1)) given upon a special case stated in previous proceedings between the suppliant and the Crown in reference to the same question. This judgment was upheld in the Full Court (per Madden C.J. and A'Beckett J., Williams and Hood JJ. dissenting) on the ground that the suppliant did not use the Government buildings for the purposes of residence within the meaning of the Act, and that if he did he was "entitled to quarters." It was further held that the absence of provision in the Annual Appropriation Acts for payment of the amounts claimed was no answer to a petition of right.

At the trial of the second case the same judge stated that the question turned on the construction of s. 89 of the Act No. 773 in 1883, which had been determined by the Court in *Fisher* v.

(1) (1890) 16 Vict. L. R. 777.

J. C. 1903 REX v. FISHER. — REX v. BULL.

Reg. (1) That the interpretation so put upon the section was that the words "not entitled to quarters" explained or emphasized the true meaning of the words "allowed to use for the purpose of residence"; that the purpose of residence must be the purpose of occupying the building as a residence, as distinguished from its occupation for the purpose of effectively performing the duties of the officer: in such a case residence was not the object in view, and that the officer had to reside there whether he liked it or not, and if so he did not go there for the purpose of residence; and upon the evidence he found that the purpose for which the respondent resided at the gaol was that of effectively performing his duties, and that he could not efficiently or properly perform them without so residing.

In the Appeal Court, the Chief Justice in his reasons stated that the arguments prevailing in the case of *Fisher* v. *Reg.* (1) (decided on the same day) were such as to make the judgment in that case govern the present case; that there were some facts in Fisher's case different from the present case, but they were not so materially essential as to affect the present case; that the respondent was not in the public service until after the Act of 1883, whereas Fisher was in the public service before that Act, but that made no difference; and that it was impossible for the respondent to live elsewhere than at the gaol at his own will, and he would have to occupy the quarters which he had there in order to carry out his duties; he had also formally protested against the deduction.

Haldane, K.C., and *Rowlatt*, for the appellant, contended that the Crown was entitled to judgment in the first case, because the suppliant could only claim salary at 540*l.* a year under the Order in Council, January 12, 1885, and that order specifically provided for a deduction for rent. It was shewn by the evidence that the suppliant had occupied for the purpose of residence buildings belonging to the Government, and it was not shewn that he was entitled to quarters. His salary, moreover, was fixed in contemplation of his occupation of the very buildings he did occupy in the manner in which he did occupy

(1) 16 Vict. L. R. 777.

them, and on the terms of his submitting to a deduction for rent. During the period in question the Annual Appropriation Acts only provided for the respondent's salary subject to the deduction. In the second case the suppliant was assigned a salary of 570*l.*, subject to the deduction of 70*l.* from July 30, 1890, to March 26, 1892, while before and after that period he was assigned a salary of 500*l.* Reference was made to *Churchward* v. *Reg.* (1); *Howlett* v. *Tarte.* (2)

Bray, for the respondent, contended that the case was concluded by the judgment on the special case of *Fisher* v. *Reg.* (3) in 1890, certain paragraphs of which had been admitted in evidence in this. The facts found by the Courts bring this case within that decision, which was to the effect that the Government was not entitled to deduct rent from the respondent's salary although he was obliged to reside at the office for the purpose of performing his duties. The respondent was not an officer who was not entitled to quarters and not allowed to use the office for the purpose of residence within the meaning of s. 89 of the Act of 1883, re-enacted as s. 136 of the Act of 1890. The Appropriation Acts could not take away the respondent's right to his salary; the Government must find the money wherewith to pay its just debts. He cited *Outram* v. *Morewood* (4); *Shoe Machinery Co.* v. *Cutlan* (5); *In re Alison.* (6)

Haldane K.C., replied.

THE KING *v.* FISHER.

1903 Feb. 13.

The judgment of their Lordships was delivered by

SIR FORD NORTH. This is an appeal to His Majesty in Council from a judgment dated May 27, 1901, of the Full Court of the Supreme Court of Victoria, dismissing an appeal from a judgment of Holroyd J. in favour of the present respondent upon a petition of right presented by him.

The respondent entered the public service of Victoria in the

(1) (1865) L. R. 1 Q. B. 173.
(2) (1861) 10 C. B. (N.S.) 813.
(3) 16 Vict. L. R. 777.
(4) (1803) 3 East, 346, 355; 7 R. R. 473.
(5) [1896] 1 Ch. 667.
(6) (1873) L. R. 9 Ch. 1, 25.

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year 1858. On February 7, 1881, he was appointed post-master and telegraph manager at Geelong, and he continued to fill that post until December 31, 1896, when he was superannuated on his statutory pension. It was necessary for the efficient performance of his duties as such officer that he should reside, and he was required to reside, upon the post-office premises; and he did accordingly from 1881 to 1896 with his wife and family occupy a part of the post-office buildings appropriated to him.

It was provided by the Public Service Act, 1862 (No. 160), s. 52, that—

"Where any officer is allowed to use for the purpose of residence any building belonging to the Government, the Governor in Council may direct that a fair and reasonable sum as rent thereof be deducted from such officer's salary."

In 1883 that Act was repealed by the Public Service Act (No. 773), save and except as to all matters and things done under and to all the privileges and rights then existing or thereafter accruing of all persons subject to the provisions of that Act. Sect. 17 provided that in the clerical division (to which the respondent belonged) each of the five classes should have the maximum and minimum salary and the annual increment thereto mentioned in the 2nd schedule to the Act; and s. 18 authorized the Governor in Council, upon the recommendation of the Public Service Board, to appoint a fixed salary to an officer without annual increment. Sect. 52 of the old Act was re-enacted, with an important edition, by s. 89 of this Act, which is as follows:—

"If any officer *not entitled to quarters* is allowed to use for the purpose of residence any building belonging to the Government, the Governor in Council may direct that a fair and reasonable sum as rent thereof be deducted from such officer's salary, and the amount of such sum shall be fixed by the Board."

By the Public Service Act, 1890 (No. 1133), Act No. 773 was repealed; but by s. 136, s. 89 of the Act No. 773 was re-enacted verbatim.

The Government *Gazette* of January 31, 1885, contained a return made by the Public Service Board under s. 25 of the Act

of 1883, which stated that Mr. Fisher's emolument as postmaster on December 31, 1884, was 430*l.* salary, with allowances of quarters, fuel, and water.

On January 12, 1885, the Governor in Council approved of a recommendation by the Board purporting to be made under s. 18 of the 1883 Act (No. 773), that the salaries of postmasters at certain named places should be as specified, subject to fair and reasonable deduction for rent; and the salary specified for Geelong, Class II., was 540*l.* This was followed by another order of the Governor in Council of February 3, that in accordance with s. 89 of the Act of 1883 a fair and reasonable sum as rent should be deducted from the salary of every officer occupying for the purpose of residence any building belonging to the Goverment. This, it will be noticed, is wide enough to include officers entitled to quarters, although they are expressly excepted from s. 89; and the Public Service Board, purporting to act on s. 89, proceeded on May 14, 1885, to fix the value of the quarters of the officers mentioned in the schedule at the amounts set opposite each place respectively. That schedule included Geelong, salary 540*l.*, rent 72*l.* This shews that, in the opinion of the Board, the premises which the respondent occupied, and in respect of which he was charged with rent, were "officers' quarters."

Down to this time no deduction by way of rent in respect of residence had ever been claimed from the respondent, or from other persons in a like position; but from this time forward the Crown deducted 72*l.* each year for rent from the respondent's salary of 540*l.*, notwithstanding his protests, and only paid him the balance. Ultimately, in 1889, a special case was stated as between Mr. Fisher and the Crown for the purpose of obtaining the opinion of the Court upon the question (among others) whether the Governor in Council was justified in deducting from Mr. Fisher's salary the sum of 72*l.* per annum for rent for quarters at the post-office."

Paragraphs 5, 10, and 11 of that special case (which were admitted as evidence in the present proceedings) were as follows:—

"Paragraph 5. For the purpose of performing his duties

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the petitioner (i.e., the present respondent), has to be in attendance at the said office, and has to reside at the said office, and sometimes has to work overtime.

"Paragraph 10. Before the 12th day of January, 1885, the petitioner, like all other postmasters who resided at a post-office, was treated as entitled to live at the post-office with his family, and in the official returns published in the Government *Gazette* his emoluments were always stated as—

"(1.) The amount of his salary without deduction; and

"(2.) Quarters, fuel, and water.

"Paragraph 11. In all the Appropriation Acts of the Parliament of Victoria up to the said 12th of January, the petitioner and all other postmasters and telegraph managers were described as being allowed quarters, fuel, and water, and except the persons so described in the Appropriation Acts, there were not at the time of the passing of the Public Service Act, 1883, any persons 'entitled to quarters' within the meaning of the 89th section of that Act."

The answer of the Court to the above-mentioned question was that the Governor in Council was not justified in deducting the 72*l.* for rent. The Court pointed out that under s. 89 of the Act power to make a deduction for rent only existed where an officer had not any right or title to quarters; and that this state of facts was excluded by paragraph 5 of the special case, finding that the postmaster had to reside; and the Court drew a distinction between the cases of a man allowed to occupy Government premises, if he desired to do so, and of a man compelled to reside upon Government premises for the performance of his duties there whether he liked it or not.

In consequence of that decision the sum of 226*l.* (being the amount of the deductions improperly made for rent) was paid to Mr. Fisher by the Crown. In other respects, however, the Crown simply ignored that decision, and continued to deduct 72*l.* per annum for rent from his salary as before. The appropriation Acts from 1891 to 1896 continued to refer to his being allowed a salary with "quarters, fuel, and water," and the annual return in the January *Gazette* in each year under s. 28

of the Public Service Act No. 1133 (which section followed verbatim s. 25 of the repealed Act of 1883) put Mr. Fisher's salary at 540*l*. It also stated that every officer occupying for the purpose of residence any building belonging to the Government was charged a fair and reasonable sum for rent, which sum was deducted from his salary, although the Court had decided in the special case that such deduction was illegal against Mr. Fisher. But, although under the Public Service Acts Mr. Fisher was entitled to a salary of 540*l*., the Appropriation Acts for 1891 and subsequent years were so framed as to provide 468*l*. only to meet it; and that sum and no more was, in spite of his protests, paid to him in each year down to the date of his final retirement; that is to say, the deduction of 72*l*. per annum for rent from his salary, which had been decided to be illegal, was persisted in.

Upon his retirement the respondent commenced these proceedings by petition of right to recover the sums so deducted since the year 1890. The answer set up the old defence; and an amended answer raised the further defence that, as the Appropriation Acts in each year provided 468*l*. and no more for the payment of Mr. Fisher's salary, there was no further money legally available for the purpose.

The case was tried before Holroyd J., who decided in Mr. Fisher's favour; and this was affirmed by the Full Court, Williams and Hood JJ. dissenting.

In their Lordships' opinion that judgment was unquestionably right. When s. 52 of Act No. 160 was altered by s. 89 of Act No. 773, by the introduction into the latter of the words "not entitled to quarters," without any express explanation of their meaning, it cannot be doubted that the alteration, making the power of deducting rent less extensive than before, was made with reference to the state of circumstances existing at the time, and with the express object of exempting from payment of rent for quarters persons who had never been charged with rent, although the words of s. 52 of the Act of 1862 were wide enough to include them. The dissenting judges took a different view, and held that the words added had no specific meaning, but were merely inserted by way of

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extra caution to provide for the possible future event of some person coming forward who might make out such a right. Their Lordships cannot place such a construction upon the Act. The Chief Justice examined the Appropriation Acts for forty-two years past, and pointed out that for the whole of that period certain classes of public officers (in which officers in charge of gaols and postmasters were included) had been provided in addition to their salaries with quarters, fuel, and water; and also that there were many instances in those Acts in which a temporary pecuniary allowance was made to officers for "loss of quarters" or "in lieu of quarters." There is, moreover, the admitted fact that at the passing of the Act of 1883 (No. 773) there were not any persons "entitled to quarters" within the meaning of s. 89 of that Act except those described in the Appropriation Acts as allowed quarters, fuel, and water. Their Lordships have no hesitation in deciding that the persons so allowed quarters were the persons excepted from the operation of ss. 89 and 136 of the Acts Nos. 773 and 1133 as "officers entitled to quarters." Mr. Fisher, therefore, is not within either of those sections, and no deduction for rent can legally be made thereunder from his salary.

The two dissenting judges took the view that, although Mr. Fisher had been allowed quarters, he could not claim to be entitled to them without some express provision by contract or statute conferring such title upon him; and no such provision was proved. But their Lordships cannot agree in this view. They consider that when Mr. Fisher entered into a legal contract to perform certain duties which necessarily involved his residence in quarters provided for him at the post-office, it cannot be said that he was not entitled to those quarters while that contract was in force. Any further provision as to such quarters would have been unnecessary and superfluous.

The dissenting judges also held that, whatever right Mr. Fisher might otherwise have had, he lost it by acquiescing without complaint in the annual deduction made from his salary. It is difficult to see how any such acquiescence not sufficient to create a bar by statute could have furnished a

defence to a legal claim for salary, and no such point was made by the defence. But in fact there was not any such acquiescence. He did protest; and the Attorney-General instructed the Crown Solicitor to sign a letter admitting that he did so to be used on this appeal, which will be found on the last page of the record.

It was also said that when Mr. Fisher accepted a salary of 540*l.*, subject to a fair and reasonable deduction for rent under the order of January 12, 1885, he precluded himself from objecting to a deduction of rent. But this is a misapprehension of the meaning of that order. It was made under s. 18 of the Act of 1883, to fix Mr. Fisher's salary permanently at 540*l.* without the right of increment up to 600*l.*, which otherwise he would have had under s. 17. It applied to other persons as well, and, if read as providing for deduction in cases where a deduction could legally be made, it is not open to objection. But this Order in Council could not have been intended, and could not legally operate, to impose a deduction for rent upon a person who was, by s. 89 of the same Act, expressly exempted from any such deduction.

Another point set up by way of defence was that, as the Appropriation Acts only provided 468*l.* for Mr. Fisher's salary, nothing further could be recovered against the Crown. This was very fully and exhaustively dealt with by the Chief Justice; and his reasoning on this point was not challenged at their Lordships' bar. But in any case their Lordships would not enter upon the consideration of that question, as they are satisfied that, the respondent having finally established the validity of his claim against the Crown for the sum for which he has recovered judgment, the provision necessary to satisfy that obligation will be readily and promptly made.

Under these circumstances their Lordships will humbly advise His Majesty that the appeal should be dismissed. The costs must be paid by the appellant.

THE KING *v.* BULL.

This case in all material circumstances closely resembles the last. The present respondent, Colonel Bull, seeks to recover

J. C. 1903 REX v. FISHER. REX v. BULL.

from the Crown sums improperly deducted from his salary in respect of rent; and this is an appeal by the Crown from the decision of the Full Court of the Supreme Court of Victoria, which confirmed the judgment of the Court below in Colonel Bull's favour for 635*l.* 16*s.* 8*d.*

The material facts are as follows: Colonel Bull entered the public service in 1884. In 1889 he was appointed governor of Melbourne Gaol. The Public Service Board by two certificates, each dated July 30, 1890, fixed the value of the *quarters occupied* by the governor of the Melbourne Gaol and by the governor of the penal establishment at Pentridge respectively at 70*l.* per year. By an order of the Governor in Council dated August 25, 1890, the salary of Colonel Bull as governor of Melbourne Gaol was fixed at the sum of 570*l.* per annum from July 30, 1890; and by another order of the Governor in Council of the same date a deduction of 70*l.* per annum was directed to be made from his salary for the use of the building belonging to the Government which he occupied for the purpose of residence, meaning his quarters in the prison. The governorship of Pentridge Gaol being about to become vacant on March 25, 1892, the Board, on February 26, recommended the transfer of Colonel Bull, second class, fixed at 570*l.* a year, to the vacant office from March 26, subject to a fair and reasonable deduction for rent. The Order in Council of March 2, 1892, fixing his salary at 500*l.* a year, and saying nothing about deductions, was only a short method of carrying into effect the recommendation of the Board, and ought to be so regarded. The proposed transfer was made; and Colonel Bull held that post until he retired from the public service on July 31, 1899, on his statutory pension calculated on a salary of 570*l.*

During the whole time he was governor Colonel Bull resided at Melbourne and Pentridge Gaols respectively in the quarters assigned to him there. He had no choice but to do so. In order to perform his duties it was essential that the officer in command and charge of the prison should reside on the spot. The rules and regulations relating to penal establishments and gaols were (very properly) extremely strict in that respect. Rule 217 of the Regulations of February, 1892, provided that

where quarters were not provided for the second executive officer the Inspector-General might make such arrangements for the charge of the prison as he might consider advisable. No provision was made for the more important case of the head officer not being provided with quarters. The reason is obvious, namely, that no such case could arise. The Appropriation Acts from a period long antecedent to Colonel Bull's appointment down to 1900 treated governors of gaols as provided with quarters, fuel, light, water, and prisoner servants.

During the period of Colonel Bull's service the Crown regularly each year deducted 70*l.* from his salary as rent for his quarters, notwithstanding his protests, and paid him 500*l.* only; and they attempted to justify such deduction under ss. 89 and 136 of the Acts of 1883 and 1890 (Nos. 773 and 1133). Ultimately Colonel Bull took these proceedings by petition of right to recover the sum thus deducted. He recovered judgment against the Crown in the Court below, and this was confirmed on appeal. The judgment on appeal was given by the Chief Justice, and it does not appear whether any judge dissented or not.

Their Lordships concur entirely in that decision. For reasons given fully in Fisher's case, which need not be here repeated, they hold that Colonel Bull clearly was an officer entitled to quarters within the meaning of the two sections above mentioned, and therefore that no deduction by way of rent could legally be made from his salary. He was outside those sections altogether.

They will therefore humbly advise His Majesty that this appeal should be dismissed.

The costs must be paid by the appellant.

Solicitors for appellant: *Freshfields.*

Solicitors for respondents: *Baker & Nairne.*

[PRIVY COUNCIL.]

J. C.* 1903 Feb. 3, 13.

WALKER . . . . . PLAINTIFF;

AND

WALKER . . . . . DEFENDANT.

Ex parte WALKER.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Petition for Leave to Appeal in Formâ Pauperis—Application must be first made to Court below.

It is a rule of general if not universal application that the Judicial Committee will not entertain a petition for leave to prosecute an appeal in formâ pauperis where the Court below has power to grant leave on the usual conditions, unless in the first instance an application for leave to appeal has been made within due time to the Court from which it is proposed that the appeal should be brought.

THIS was a petition by the plaintiff, dated at Sydney, January 28, 1902, for leave to appeal and to prosecute the appeal in formâ pauperis. It alleged an action against the respondent, as representing the Government, to compel the issue of a grant of the land in suit, a verdict for the plaintiff at the trial, an order by the Supreme Court, dated May 23, 1901, setting aside the same and entering a verdict for the defendant, that the property was worth more than 500*l.*, and that the petitioner was unable to appeal unless allowed to do so in formâ pauperis.

Meyrick Beebee, for the petitioner.

1903 Feb. 13.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This petition was before their Lordships on February 3. It was an application for special leave to appeal and to prosecute the appeal in formâ pauperis. It appeared that no application for leave to appeal had been made

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

to the Supreme Court of New South Wales, from which it was desired that an appeal should be brought. On that ground, apart from all other objections, it seemed to their Lordships that the application was irregular.

The learned counsel for the petitioner referred their Lordships to a case in New South Wales—*Ex parte Commissioner for Railways* (1)—and stated that that case was understood in New South Wales to have laid down the rule that a litigant desiring to prosecute his appeal to His Majesty in Council in formâ pauperis ought to "apply direct to the Privy Council" without applying in the first instance to the Supreme Court for leave to appeal. Their Lordships do not think that the judgment of Simpson J., to which particular reference was made, is open to that construction. All that the learned judge seems to have meant was that the Supreme Court could not authorize an intending appellant to prosecute his appeal before His Majesty in Council in formâ pauperis.

It was also suggested that the practice of this Committee had not been uniform, and the registrar informed their Lordships that he could not say that there was no foundation for that suggestion.

As it is most important that the practice should be uniform, and the rule clearly laid down, their Lordships directed that further inquiries should be made, and that in the meantime the petition should stand over.

The registrar has informed their Lordships that during the last four years there have been ten applications for leave to prosecute an appeal in formâ pauperis bearing on the point under consideration, and that in one of those cases leave was granted, although it appeared from the petition that no application for leave to appeal had been made to the Court below. The circumstances of that case were so peculiar as to justify a departure from the ordinary rule. With the exception of that case the practice on the point now in question seems to have been uniform, and certainly there was one case—an unreported case—from New South Wales (*Comber* v. *Hogg*, heard on November 27, 1900) in which it appears from the shorthand

(1) (1900) 20 N. S. W. R. (Eq.) 28.

J. C. 1903 WALKER, *Ex parte.*

notes that the application was refused expressly on the ground that no application for leave to appeal had been made to the Supreme Court.

Their Lordships desire that it should be clearly understood, as a rule of general if not universal application, that this Committee will not entertain a petition for leave to prosecute an appeal in formâ pauperis, where the Court below has power to grant leave on the usual conditions, unless in the first instance an application for leave to appeal has been made within due time to the Court from which it is proposed that the appeal should be brought.

The order in the present case from which it was proposed to appeal was made on May 23, 1901. The time for applying to the Supreme Court for leave to appeal is the period of fourteen days only. When the prescribed period has expired without any application having been made for leave to appeal, the successful litigant is entitled to rely upon his decree and to feel assured that the litigation is at an end. The application for leave to appeal and to appeal in formâ pauperis was not lodged in the Privy Council Office until the expiration of more than eighteen months from the date of the order. In these circumstances the application, even if it were not irregular, would be absurd. But their Lordships desire it to be understood that, in their opinion, this petition ought to be refused on the ground that no application for leave to appeal was made within due time to the Supreme Court in New South Wales.

Their Lordships will accordingly humbly advise His Majesty to dismiss the petition, but that in accordance with the usual practice the Council Office fees should be remitted.

Solicitors for petitioner: *Hewlett & Co.*

[PRIVY COUNCIL.]

WALLIS AND OTHERS . . . . . PLAINTIFFS.

AND

SOLICITOR-GENERAL FOR NEW ZEALAND . . . . . } DEFENDANTS.

J. C.*
1902
Dec. 2.
1903
Feb. 10.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Administration of Charitable Trust—The Crown cannot as Defendant impeach the Trust—Construction of Grant—Valid Gift for Charitable Purposes—Failure of Specified Purpose—Cy-près.

Considered. In re BRADWELL [1952] 1 Ch. 575

It is contrary to the established practice of the Court to permit a defendant to an action for the administration of the trusts of a settlement not void on the face of it to impeach the settlement in his defence to that action.

Where the Crown, as party defendant to a suit for the administration of a charitable trust, obtained from the Court below an order that the trust was void and that the land and money in suit had become its property :—

Held, that the suit was not one in which the order could properly be made.

Where it appeared that certain Maori chiefs had in 1848 ceded 500 acres of land, part of the native reserves, with the consent of the Crown, which waived its right of pre-emption thereof, to the Bishop of New Zealand in trust for a college to be erected thereon for the general purpose of promoting religion, and no college had been erected, the land having in course of time become an unsuitable site, while the accumulations of its rent had amounted to a considerable sum :—

Held, that there had been an express gift of land and money for charitable purposes; that such a gift is not invalidated by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all; and that the doctrine of cy-près was applicable.

APPEAL from a decree of the Court of Appeal (May 22, 1901) reversing a decree of the Supreme Court (Sept. 7, 1900).

In November, 1898, the appellants, who became trustees of the properties in suit under the circumstances stated in the judgment of their Lordships, filed their suit, in which they claimed an order for the expenditure of the income of the

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

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trust in accordance with a scheme submitted. That scheme embodied a resolution of the General Synod to the effect that, inasmuch as the trusts of the said Crown grant, namely, for the erection of an episcopal college thereon, could not be carried out with advantage, the trustees were directed to apply to the Supreme Court for power to expend the rents of the land and the income of the accumulated fund in providing exhibitions for enabling children to receive higher education at Church of England schools in any part of New Zealand, subject to certain conditions as to the nature of the education to be received, as to preference being given to Maori children, and otherwise.

The respondent by his defence pleaded in effect that the land and accumulated fund had reverted to the Crown without any trust being attached thereto, and that the question of how the same ought to be disposed of should be dealt with by Parliament, and that the Court had no jurisdiction to direct a scheme. If, however, the Court had jurisdiction, then an alternative scheme was propounded. He subsequently amended his defence by pleading that the Crown grant was void as having been issued without any statutory or other authority.

Prendergast C.J. considered that a general charitable intention was shewn by the Crown grant, so that, if the particular object could not be attained, the trust might be administered cy-près; but, not being satisfied upon the evidence that a school corresponding with the description in the Crown grant could not then be established and carried on with advantage to the community, declined to adopt either of the proposed schemes, and reserved the matter for further consideration.

The appellants thereupon filed, on March 26, 1900, an amended scheme, by which they proposed that the income of the trust should be expended in assisting in the maintenance of an institution about to be erected in the Wairarapa Valley by trustees (including some of the appellants), in whom were vested lands in the Wairarapa Valley originally granted to the Bishop of New Zealand for the use, maintenance, and support of a college in the Wairarapa Valley.

On September 7, 1900, the Supreme Court (Stout C.J. and Edwards J.), adopting the views expressed by Prendergast C.J., ordered that the scheme, after certain alterations suggested by themselves had been made, should be adopted.

The Appeal Court reversed this order on the grounds (1.) that, the Crown grant having been made in contemplation of the establishment of a school which was never in fact established, the grant was void by reason of the Crown having been "deceived" in its grant, and (2.) that the estate granted had ceased to exist because, upon the true construction of the grant, the estate granted to the bishop was in the nature of a conditional limitation determinable when religious education, industrial training, and instruction in the English language ceased to be given in the school.

In the course of the hearing of the said appeal the respondent applied for leave to amend his defence by raising the contention that the terms of the cession of the land by the natives to the Crown precluded the administration of the property otherwise than in the terms of the grant, and that the Crown had a duty to observe the terms of the cession. Such application was acceded to by the Court, and in pursuance of an order made by consent on May 24, 1901, the defence was amended accordingly.

Levett, K.C., and *Pennefather*, for the appellants, contended that there was no evidence that the Crown had been deceived in making what has been called its grant. The evidence shewed that the Government fully approved the grant by the Maori chiefs, and willingly and with a full knowledge of all the circumstances waived its right to pre-emption of the lands comprised in it, which was all the interest which the Crown possessed. The grant was a valid grant to the bishop and his successors in fee simple, and not by way of conditional limitation. The land was never the property of the Crown, and has never reverted to the Crown. The trust affixed to it was for charitable purposes generally, and it was submitted that the scheme adopted by the order of September 7, 1900, is a proper scheme for the application of the charitable property cy-près.

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There was nothing in the terms of the grant which precluded the Court from so ordering, or which prevented the Crown from consenting thereto. Reference was made to *Incorporated Society* v. *Price* (1); *Biscoe* v. *Jackson* (2); 6 Bacon's Abridgment (7th ed.), "Prerogative," p. 515; Chitty on Prerogative, pp. 396, 398; *Attorney-General* v. *Pyle* (3); *Attorney-General* v. *Bishop of Chester*. (4) The doctrine of cy-près is applicable to Crown grants: *Attorney-General* v. *Shrewsbury Corporation* (5); *Attorney-General* v. *Dedham School* (6); *Clephane* v. *Lord Provost of Edinburgh* (7); *Wilson* v. *Barnes*. (8)

Haldane, K.C., and *Northcote*, for the Solicitor-General of New Zealand, contended that the judgment of the Court of Appeal should be affirmed. On the true construction of the grant, and having regard to all the circumstances under which it was made, it was clearly intended for the benefit of one particular institution, namely, the college which it was provided should be erected. The grant was not made with any general charitable intention. It follows that the trusts thereof cannot be administered cy-près. It appears that the Crown in its grant expressed the nature and object of the trust; the natives who made the cession did so for an expressed specific purpose. Having regard to the terms and circumstances of the cession the trust cannot be administered cy-près, or in the manner proposed by the appellants and sanctioned by the first Court. One practical objection is that the diversion of the trust so made would benefit other than the objects of the donors' bounty, and prevent the descendants of the donors from sharing in the benefits. In fact, the grant was void ab initio through the non-establishment of the college. The consideration for the grant has failed. Even if it took effect, its duration was limited to so long as a definite instruction was given; and accordingly it has ceased, and the property has reverted to the Crown. The grant was without statutory authority; and, further, the doctrine of cy-près is inapplicable

(1) (1844) 1 J. & Lat. 492.
(2) (1887) 35 Ch. D. 460.
(3) (1738) 1 Atk. 435, 507.
(4) 1 Bro. C. C. 444.
(5) (1843) 6 Beav. 220.
(6) (1857) 23 Beav. 350, 356.
(7) (1869) L. R. 1 H. L., Sc. 417.
(8) (1886) 38 Ch. D. 507.

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to trusts created by the Crown. After distinguishing the cases of *Biscoe* v. *Jackson* (1) and *Incorporated Society* v. *Price* (2), cited for the appellants, they referred to *In re Rymer* (3), and to three instances of the doctrine of cy-près not being applicable to Crown grants: *Attorney-General* v. *Smart* (4); *Attorney-General* v. *Middleton* (5); *Attorney-General* v. *Mayor of Galway*. (6) The case of *Barnes* v. *Wilson* (7) is one where the Crown gave its consent.

Levett, K.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal by persons claiming to be trustees of a certain charitable endowment in New Zealand against an order of the Court of Appeal of that Colony. The order appealed from was made at the instance of the Crown on the occasion of an application by the trustees asking for the approval of a scheme for the administration of the charity.

The effect of the order was to pronounce the endowment null and void from its very commencement, and to discharge the trustees from all active duties in connection with it, declaring the charity property to have become the property of the Crown, but leaving it still in the hands of the trustees, and for the time being at least apparently derelict.

So far as the evidence goes there can be no dispute about the facts. The documents relating to the foundation of the charity are on record. The earliest of those documents in point of date and the most important is an instrument not under seal which, in accordance with the legal phraseology in use in the Colony, is described in a subsequent Crown grant as a "deed" of cession. It is in fact a letter addressed to Sir George Grey, the Governor of New Zealand, by certain native chiefs and leading men among the Maoris who were then in possession of lands called Witireia, in the district of Porirua, near the south-

(1) 35 Ch. D. 460.
(2) 1 J. & Lat. 492.
(3) [1895] 1 Ch. 19.
(4) (1748) 1 Ves. Sen. 72.
(5) (1751) 2 Ves. Sen. 326.
(6) (1829) 1 Molloy (Ir.) 95, 108.
(7) 38 Ch. D. 507.

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western extremity of the northern island. The body of the letter is in the following terms:—

"Otaki, 16th August, 1848.

"Friend Governor Grey,

"Greeting—It is a perfect consenting on our part that Witireia shall be given up to the bishop for a college. We give it up not merely as a place for the bishop for the time being, but in continuation for those bishops who shall follow and fill up his place, to the end that religion or faith in Christ may grow, and that it may be as it were a shelter against uncertain storms—that is, against the evils of this world. This is the full and final giving up of that place as a college for the bishops of the Church of England."

It is in evidence that some of the donors, and those the leading men amongst them, were converts to Christianity who had been educated under the superintendence of the Right Reverend George Augustus Selwyn, then Bishop of New Zealand, at St. John's College, Auckland. That college, founded by the bishop and named after his own college at Cambridge, was established for the purpose of providing religious education, industrial training, and instruction in the English language for Her late Majesty's subjects of all races, and of children of poor and destitute persons being inhabitants of islands in the South Pacific. It was a flourishing institution, and regarded as a powerful factor in the civilisation of the country. The bishop, as is well known, had acquired an extraordinary influence in New Zealand. His striking personality, his devotion to his Master's service, and his zeal for the welfare of the Maori race, had produced a profound impression on the native mind. It cannot be doubted that it was the object of the donors, so far as in them lay, to imitate the bishop's example, and to make some provision towards the establishment of an institution like the Auckland College near their own homes in the south of the island. The cession is in terms an absolute, unqualified, and unconditional dedication to charity, the general purpose or end of which is declared to be "that religion or faith in Christ may grow."

The Government at the time warmly commended the action of the native donors. The answer to their letter has not been put in evidence, but its tenor may be gathered from the following minute dated October 7, 1848, and signed by the Lieutenant-Governor, which is printed in the record:—

"Acknowledge this, and say that I shall have much pleasure in sanctioning this giving up a portion of their reserves at Porirua for the benevolent and useful purpose of founding a college, and that I will communicate their offer to the Lord Bishop. Such laudable and generous conduct will be made known in England, and cannot fail of insuring the commendation of all good men, and the Queen will rejoice in seeing her Maori subjects setting so good an example to the Europeans.

"When they wish I will send over a surveyor that they may indicate the quantity and boundaries of the land they wish to transfer to the bishop, that a plan may be made and the arrangement completed.

"E. Eyre,
"Lieutenant-Governor."

The Governor, it will be observed, sanctioned the proposed cession, and undertook to give effect to it without attempting to make any stipulation, condition, or reservation of any sort or kind. As the law then stood under the treaty of Waitangi, the chiefs and tribes of New Zealand, and the respective families and individuals thereof, were guaranteed in the exclusive and undisturbed possession of their lands so long as they desired to possess them, and they were also entitled to dispose of their lands as they pleased, subject only to a right of pre-emption in the Crown. It was not until 1852 that it was made unlawful for any person other than Her Majesty to acquire or accept land from the natives (15 & 16 Vict. c. 72, s. 72). The founders of the charity, therefore, were the native donors. All that was of value came from them. The transfer to the bishop was their doing. When the Government had once sanctioned their gift, nothing remained to be done but to demarcate the land and place on record the fact that the Crown had waived its right of pre-emption. That might have

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been effected in various ways. The course adopted was to issue a Crown grant. That, perhaps, was the simplest way, though the Crown had no beneficial interest to pass. After all it was only a question of conveyancing, as to which the native owners were very possibly not consulted.

In accordance with the Governor's suggestion, the land intended to be included in the cession was marked out and surveyed. It was found to comprise about 500 acres. On December 28, 1850, the arrangement was completed by the issue of a Crown grant with a plan annexed. The Crown grant contained the following introductory recitals:—

"Whereas a school is about to be established at Porirua under the superintendence of the . . . . Bishop of New Zealand for the education of children of our subjects of all races, and of children of other poor and destitute persons being inhabitants of islands in the Pacific Ocean. And whereas it would promote the objects of the said institution to set apart a certain piece or parcel of land in the neighbourhood thereof for the use and towards the maintenance and support of the same, which piece or parcel of land has by a deed from the natives been ceded for the support of the said school."

The grant was expressed to be made to Bishop Selwyn, to hold to him and his successors "in trust nevertheless to and for the use and towards the maintenance of the said school so long as religious education, industrial training, and instruction in the English language shall be given to the youth educated therein or maintained thereat."

In the year 1859, under the provisions of the Bishop of New Zealand Trusts Act, 1858, Bishop Selwyn conveyed the charity land to certain trustees nominated by the General Synod of the Church in New Zealand in communion with the established Church of England. The present appellants are their successors in the trust.

The land at the date of the cession was rough land covered with scrub and apparently difficult of access. In order to improve it and make it available for pastoral purposes (the only use to which it could have been put at the time), Bishop

Selwyn spent out of his own moneys a sum of about 200*l.*, which is said to have been more than the then value of the land.

No school or college has as yet been erected on the land or in the neighbourhood of it. The land has been let from time to time as grazing land, and the trustees have invested and accumulated the rents and profits.

In 1897 the accumulations amounted to a sum exceeding 6000*l.* The land had increased in value, but owing to the falling off of the native population the neighbourhood had become unsuited for the purpose of a school or college such as that contemplated by the original donors. In these circumstances the General Synod of the Church resolved that an application should be made to the Court for directions as to the administration of the charity. In the first instance the trustees communicated with the law officers of the Crown, sending them a copy of a proposed statement of claim and draft scheme. The office of Attorney-General was then vacant. The matter came before the Solicitor-General. After a delay of three months he returned an unsatisfactory answer. He said that Ministers desired to consult Parliament on the general subject of such trusts during the coming session, and that he was therefore precluded from approving the proposed scheme. He suggested that the trustees should defer proceeding further for the present, adding by way of encouragement or warning that "the position now taken by the Government" was "not necessarily hostile" to the interests which the trustees represented.

In deference to the suggestions of the Solicitor-General, the trustees waited until the end of the session, and then, as nothing had been done in Parliament, they applied to the Court for the approval of the proposed scheme.

The Solicitor-General, in the absence of the Attorney-General, was made a party. He put in a defence. In his defence he took a line which must seem somewhat strange to those who are familiar with the administration of charitable trusts in this country. It is the province of the Crown as parens patriæ to enforce the execution of charitable trusts, and

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it has always been recognised as the duty of the law officers of the Crown to intervene for the purpose of protecting charities and affording advice and assistance to the Court in the administration of charitable trusts. The Solicitor-General, however, adopted a very different course. He seems to have thought it not inconsistent with the traditions of his high office to attack a charity which it was primâ facie his duty to protect. He suggested that the Crown was or might be entitled to the property. In the event of his failing on that point, which was the principal ground of his defence, he submitted a scheme in which the original trusts of the charity were apparently ignored altogether.

The case came on to be heard before the late Chief Justice, Sir James Prendergast. That learned judge rejected the Solicitor-General's contention that the endowment had reverted to the Crown, and declined to allow an amendment proposed at the hearing by which it was sought to impeach the validity of the Crown grant. He decided with more hesitation than the case seems to have required that the general purpose of the foundation was charity, and that the doctrine of cy-près was applicable. He did not, however, approve the scheme proposed by the trustees, as he thought it was not shewn by the evidence before him that it was impossible for them to establish a useful school in the neighbourhood with the funds at their disposal. At the same time he thought it clear that the trustees were right in their objection to the scheme proposed by the Solicitor-General. In these circumstances he reserved the matter for further consideration.

The case was afterwards brought up on further consideration before the present Chief Justice, Sir Robert Stout, and Edwards J. Evidence was adduced which satisfied the Court that it would be a waste of the trust moneys to erect a school at Porirua. A fresh scheme was proposed and adopted with some modifications, to which the trustees assented. The Solicitor-General renewed his objections; but the Court held that it was bound by the decree made on the original hearing.

The Solicitor-General then appealed to the Court of Appeal upon the following grounds :—

" (1.) That the funds and lands have reverted to the Crown either absolutely or as trustee upon a failure of the objects and purposes of the Crown grant, and are not subject to administration by or under direction of the Court cy-près.

" (2.) That no general charitable purpose existed or is proved either in the native donors or the Crown, but only a purpose of creating a specific school at a specified site, and the funds and lands are therefore not subject to administration by or under direction of the Court cy-près."

The learned judges of the Court of Appeal allowed the appeal and entered judgment for the Solicitor-General. They did not, however, adopt or even notice either of the grounds put forward by the Solicitor-General. They were of opinion, they said, that the land and money had become the property of the Crown for two reasons. In the first place they thought " the grant had become void on the ground that it sufficiently appeared from the evidence that Her Majesty was deceived in her grant." In the second place, assuming that a school satisfying the terms of the grant had been at one time established, they held that the duration of the trust must have come to an end, because the trust was only to last " so long as religious education, industrial training, and instruction in the English language should be given to the youth educated therein or maintained thereat." Now as it is common ground that no school was ever established at or in the neighbourhood of Porirua, it would seem to follow that the occasion on which the trust, according to the construction placed on the grant by the Court of Appeal, was to cease and determine never arose and never could have arisen. It appears, therefore, hardly necessary to consider the second ground on which the Court of Appeal determined the case in favour of the Crown. It was not pressed at their Lordships' bar.

The learned counsel for the respondent were in much the same difficulty in attempting to support the first ground upon which the Court of Appeal relied. There too the Court had recourse to an assumption which has no basis in fact. What

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evidence is there that the Crown was deceived? Absolutely none. The evidence is entirely the other way. The Governor undertook to complete the arrangement proposed by the native donors as soon as he received their letter. He did not even wait to communicate with Bishop Selwyn. It is not suggested that he communicated on the subject with anybody else. Now it would be absurd to found a charge of misrepresentation on the letter of the native donors. But if the native donors were innocent, with whom is the blame to rest? The evidence which the Court of Appeal said was sufficient to prove misrepresentation was discovered by them in the introductory recitals of the Crown grant. But the grant is not a deed inter partes. The statements in it are the statements of the Crown. The statement that a school was "about to be established at Porirua" is just as consistent with an intention on the part of the Governor to establish the school by the aid of public money, or an expectation on his part that the announcement in England of the generosity of the native donors, coupled with the approval of Her Majesty, would bring in ample funds for the object in view, as it is with the supposition of representations made to the Governor by some unknown persons interested in procuring this grant from the Crown. If the representative of Her Majesty was unduly sanguine—if he did think that the hopes and aspirations of the native donors would attain a speedy consummation—that is no ground for suggesting that the Crown was deceived. And indeed expectations which may now seem to have been over-sanguine or even unfounded might not improbably have been fulfilled if it had not been for the Maori war and the removal of Bishop Selwyn to an English See before the war was finished.

After all, what does the statement in question come to? The Crown grant says that "a school is about to be established at Porirua." That does not imply that the school was to be established within any fixed and definite period of time. The Governor must have known the circumstances as well as anybody. He knew that so far nothing whatever had been contributed towards the establishment of this school but a piece or parcel of land for the present wholly unprofitable. How could

he have been deceived into thinking that the school was to be established in the immediate future? Suppose some one at his elbow with more sense and foresight than he seems to be credited with had pointed out with effect that many hindrances might arise—that there might be a native war—that the bishop might be removed, and that the school might not be established for 50 or even 100 years—would that have altered the action of the Governor? It might have modified the language of the grant. It might perhaps have led to the omission of the word "about," or to the substitution of the expression "intended to be" for the words "about to be," or to the adoption of some other phrase not obnoxious to hypercriticism. But the substance of the transaction would not have been altered. The attitude of the Governor would have remained just the same. What the Governor was looking to when he welcomed the offer of the native donors was not the immediate establishment of a school, but the effect that the action of the natives would produce in the Colony, and above all in England. Why should the Court attribute to a Government of the past more than childlike simplicity in order that the Government of to-day may confiscate and appropriate property which never belonged to the Crown, and which the Crown encouraged the rightful possessors to dedicate to charity?

The learned counsel for the respondent, feeling that they could not support the judgment of the Court of Appeal on either of the reasons assigned, fell back on the argument suggested by the Solicitor-General, that there was no general purpose of charity, but only an intention to erect "a specific school on a specified site." But that is a very narrow view of the transaction, at variance, in their Lordships' opinion, with the express terms of the gift, and opposed to principles laid down in recognised authorities such as *Attorney-General* v. *Bishop of Chester* (1) and *Incorporated Society* v. *Price*. (2) Counsel also dwelt on the length of time which has elapsed since the date of the original gift without anything having been done in the way of establishing the proposed school. But it is well settled, as stated in Tudor's Charitable Trusts, 3rd ed.

(1) 1 Bro. C. C. 444. (2) 1 J. & Lat. 498.

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p. 53, that where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all. In support of this proposition the learned writer cites a number of authorities, the latest of which is *Chamberlayne* v. *Brockett* (1), before Lord Selborne L.C.

So far their Lordships have treated the case as if the order under appeal had been made on a proper application and in a suit properly constituted. In fact, however, the application was entirely irregular, and the suit was not one in which such an order as that obtained by the Solicitor-General ought to have been made. It is contrary to the established practice of the Court to permit a defendant to an action for the administration of the trusts of a settlement not void on the face of it to impeach the settlement in his defence to that action. If he thinks he has a case for setting aside the settlement or having it declared null and void, he must attack it openly and directly in an action or counter-claim in which he comes forward as plaintiff. Any other course would be inconvenient, embarrassing, and unfair. The present case affords a good illustration of the propriety of the rule. The Solicitor-General declined his proper duty and refused to bring an information. The trustees were compelled to come forward as plaintiffs. The Solicitor-General put in a defence. He submitted that the Crown might be entitled. The case of the Crown was launched in a half-hearted fashion. The point was suggested rather as a difficulty in the way of administration than as a claim to property. In argument before the late Chief Justice the Solicitor-General seems to have become rather bolder; but his contention was disregarded. Then he appealed to the Court of Appeal, asserting that property of which the Crown was never possessed had "reverted" to the Crown. But the validity of the charitable trust was not in issue in the suit. There could be no issue in that suit between the Crown and the charity. There was no evidence adduced on behalf of the Crown. There was no one

(1) (1872) L. R. 8 Ch. 206.

put forward by the Crown who could be cross-examined on behalf of the charity. The native donors, whose claim would at any rate be superior to that of the Crown, and whose interest is alternately magnified and ignored by the Solicitor-General, were not represented either directly or indirectly. Then on the hearing of the appeal the Solicitor-General applied for and obtained leave to amend his defence. A formal order for the amendment was afterwards obtained on the ground that such amendment was necessary "to more clearly define the grounds of defence of the Crown." But the amendment only made the confusion worse. It was a medley of allegations incapable of proof and statements derogatory to the Court. But the Court accepted it, and treated it with extreme deference. The learned judges intimate pretty plainly that if they had not been able to find satisfactory reasons for deciding in favour of the Crown, the amendment would of itself have prevented their making an order in favour of the trustees. The amendment divides itself into two parts. In the first place, it asserts that the Crown has come under some undefined and undisclosed obligations to the natives. The Court seems to think that this assertion must place the Court "in a considerable difficulty." Why? Why should a Court which acts on evidence and not on surmise or loose suggestions pay any attention to an assertion which, if true, could not have been proved at that stage of the proceedings, and which the evidence in the cause shews to have been purely imaginary? According to the evidence, the only obligation which the Crown undertook was to waive its right of pre-emption. The view of the Court of Appeal is to be found in a passage towards the end of their judgment, which runs thus: "What the original rights of the native owners were, what the bargain was between the natives and the Crown when the natives ceded the land, it would be difficult if not impossible for this Court to inquire into, even if it were clear that it had jurisdiction to do so." Their Lordships are unable to follow this observation. The land was part of the native reserves, as appears from the Government minute of October 7, 1848. At the date of the cession to Bishop Selwyn the rights of the natives in their reserves

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depended solely on the treaty of Waitangi. There is not in the evidence the slightest trace of any cession to the Crown, or of any bargain between the Crown and the native donors. Of course, if the Crown comes forward as plaintiff, the transaction may assume a very different complexion. There may be in existence evidence which has not yet been disclosed. But if the Crown seeks to recover property and to oust the present possessors, it must make out its case just like any other litigant. All material allegations must be proved or admitted. Allegations unsupported go for nothing. Notwithstanding the doubts expressed by the Court of Appeal, it is perfectly clear that the Court has jurisdiction to deal with a claim to property made on behalf of the Crown when properly brought forward. It has no right to decline jurisdiction. Still less has it a right to stay its hand at the instance of a claimant who may present a case into which it may be difficult, if not impossible, for the Court to inquire, even though that claimant be the Crown. The second part of the amendment, to which also the Court seemed disposed to yield, is more extraordinary still. It asserts that "the executive Government has determined . . . . that any departure from the precise terms of the grant by the application cy-près of the . . . . land and funds without the assent of the Parliament of the Colony would contravene the terms of the . . . . cession, and be a breach of the trust thereby confided in the Crown." "We see great difficulty," say the learned judges, "in holding that in such circumstances the Court could or ought to interfere." The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or the independence of the highest Court in New Zealand, or even to the intelligence of the Parliament. What has the Court to do with the executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the executive? Why should the executive Government take upon itself to instruct the Court in the discharge of its proper functions? Surely it is for the Court, not for the executive, to determine what is a breach of trust. Then again, what has the Court to do with the prospective action of Parliament as shadowed

forth by the executive? No one disputes the paramount authority of the Legislature. Within certain limits it is omnipotent. But why should it be suggested that Parliament will act better if it acts in the dark, and without allowing the Court to declare and define the rights with which it may be asked to deal? The present Chief Justice, who was not a party to the judgment of the Court of Appeal, took a truer view of the situation when he said that the approval of a scheme could not "in any way hamper either the Government or the Parliament in dealing with this trust."

In the opinion of their Lordships the respondent has been wrong in every step from first to last. Their Lordships will, therefore, humbly advise His Majesty that the order of the Court of Appeal should be discharged, except as to the direction therein contained for payment of the costs of the trustees; that any costs paid under that order to the Solicitor-General should be returned; that this appeal should be allowed with costs to be paid by the respondent; and that the trustees should be at liberty to retain any extra costs incurred by them as between solicitor and client out of the trust fund in their hands.

Solicitors for appellants: *Phelps, Sidgwick & Biddle.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

J. C.* 1902 Dec. 3. 1903 Feb. 10.

JOSEF AND OTHERS . . . . . PLAINTIFFS;

AND

MULDER AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Roman-Dutch Law—Fidei Commissum Conditionale—Sale of Property subject to Restraint on Alienation—Construction—Mortgages by Purchaser not a Breach of Condition.

Where husband and wife (married in community) by a duly executed deed in 1881 transferred immovable property to their son for valuable consideration, stipulating that "it shall never be sold or parted with in favour of a stranger, but shall permanently remain among legal heirs," and on the death of the surviving parent his executor executed in 1890 before the registrar of deeds a deed of conveyance to the son, who thereupon mortgaged with notice the property to strangers:—

Held, that the effect of the deed of 1881 followed by the deed of 1890 was to vest the property in the son, subject to a prohibition against alienation to any person not a member of the family:

Held, further, in a suit against the mortgagees brought on behalf of some of the son's heirs in respect of their shares in his inheritance, that, although the prohibition created a fidei commissum conditionale, i.e., a fidei commissum conditioned to come into existence on a breach of the prohibition, yet mortgages by the son, not being absolute alienations, did not constitute a breach of the prohibition until enforced by a judicial sale.

APPEAL from a decree of the Supreme Court (July 2, 1901).

The action was begun by a summons on December 6, 1890, by which the appellants claimed (inter alia) a declaration of rights and an order setting aside certain mortgage bonds; that is in substance a declaration that they were entitled to certain shares or interests in certain landed property, forming part of a farm known as Armoed, situate in the division of Oudtshoorn, Field Cornetcy of Wynands River, in the Colony

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR FORD NORTH, SIR ARTHUR WILSON, and SIR JOHN BONSER.

of the Cape of Good Hope, which formerly belonged to Johannes Jacobus Mulder, deceased.

The issue raised was as to the true construction of the instrument executed by the said Mulder and his wife, set out in their Lordships' judgment, and dated September 24, 1881. The appellants called it a bequest; the respondents an instrument of sale and purchase. In pursuance of it W. G. Mulder, one of the donors' sons, took possession of one-sixth share of the property comprised therein, and remained in possession till his death on July 8, 1899. The father died in 1890, and thereafter W. G. Mulder executed three mortgages of his share, the effect of which mortgages was in dispute in this suit, and turned on the true construction of the instrument of September 24, 1881.

The Supreme Court refused the declaration prayed for. The material part of its judgment is as follows:—

"The declaration alleges that the true effect of the document annexed to the transfer was to confer upon Willem merely a life interest in the property, and that upon his death his children succeeded jointly to the full ownership therein. The plaintiffs therefore claim a declaration of rights, and an order declaring that the mortgage bonds are now null and void and should be cancelled, and that transfers of their respective shares should be passed to the claimants.

"The construction put upon the document is contested by the defendants. Though Willem bonded the property, which with us only imposes a burden and does not affect any alienation of the dominium therein, he does not appear to have made any attempt during his lifetime to sell the same. By his last will, executed mutually with his wife, he instituted generally his wife and children his heirs to all his property, movable and immovable, giving the right of possession of the immovable property to his wife until their children should marry, when each one was to receive his or her share subject to certain conditions as to the produce; and he further prohibited his children from selling their share to any stranger, or to exchange the same, except as among themselves. If Willem had a power of disposition, and his children took the property subject to the

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prohibition, the plaintiffs, who are strangers, would not be entitled to claim transfer.

"The plaintiffs recognise this, and consequently they do not claim through the gifts to the children contained in the will of Willem and wife, but found their claim solely upon the original document executed by the grandparents.

"Several interesting propositions of law have been raised during the hearing of this case. For instance, considerable argument was expended on the question whether the document was to be considered a testamentary bequest or a contract, and the point was made that when title was given by will a real right was created, whereas under a contract only a personal right could be acquired, and consequently the mortgagees were not bound by a condition which did not run with the land.

"Such a distinction however, even if it exists, becomes immaterial as soon as it is admitted that the mortgagees took with notice, which admission they cannot well escape, seeing that the document had been registered against the title to the property before the mortgages were passed. So, too, it is not a matter of practical importance to reconcile the conflicting opinions of the text-writers as to whether a fidei commissum can be created by agreement or only by will. A fidei commissum may be either absolute or it may be conditional, and what is of importance is the terms it imposes upon the person or property subject thereto.

"So also in a contract, what has to be considered is—What are the terms agreed upon? Whether in the construction of the clause we approach the question from the standpoint of a testamentary disposition, and endeavour to discover from the language used the intention of the testator, or whether we regard it as a contract, and look at it to ascertain what was agreed upon between the parties, the result will be the same.

"What, then, does the clause in question stipulate?

"Sande on Restraints upon Alienation, ch. v., draws the distinction clearly between a direct bequest to a class coupled with a prohibition and a bequest which prohibits alienation outside of that class. The first, he says, imposes a fidei commissum simplex et purum, or simplex et absolutum, and has

the effect that the prohibited person cannot change the order of succession which the law interprets as having been laid down by the testator. In the latter instance the fidei commissum is conditional, the testator not himself bequeathing the property, but he imposes a trust upon the heir so as to bequeath it, and therefore he leaves it to his discretion to leave the property to whom he wishes, so long as he leaves it to one coming within the class of persons designated.

"This appears a sound distinction, and one applicable to a condition contained in a contract equally with a trust imposed by testaments. To bring a clause in this case within the definition of a direct bequest, the plaintiffs wish to read it as if the words 'to a stranger' had not been inserted, or rather that the words were used in a sense antithetical to 'legal heirs,' and as supplying only a reason for the prohibition.

"It may be observed that neither side adopted the view that the clause imposed an entail upon the property. Such a burden should not be presumed if the words do not clearly justify such a conclusion. In construing this document the fact must not be overlooked that the contract shews that this was not a donation, but that a substantial price was paid for the land, and unless it was clearly prohibited the purchaser might reasonably consider he could at any time reimburse himself his outlay. If that was so, the clause was not a bequest to any one of the legal heirs, and gave them no vested right in the property itself. They might have a right of pre-emption, but that is very different from a right to the property. I see no reason why effect should not be given to all the words inserted in the clause including 'to a stranger.' Giving all the words their ordinary significance, the clause appears to me not to be a bequest to the legal heirs, but rather that the parties intended to place a restriction on the purchaser, prohibiting him from alienating the property outside that class. And there is the authority of Sande in support of the view that such a condition would be satisfied if the property was sold or disposed of to any one of the legal heirs. The question of the rights of the parties under the will of Willem Gerhardus Mulder is not raised on the pleadings and cannot now be determined. All

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the Court can deal with is the document signed by the elder Mulder and his wife, and annexed to the transfer; and we are of opinion that under that document there was no bequest to the children of Willem Gerhardus Mulder, and consequently there cannot be such a declaration as is prayed in this case. Judgment will, therefore, be for the defendants with costs."

Nevill, K.C., and *Roskill*, for the appellants, contended that the instrument of September 24, 1881, was of a testamentary nature, and effected a bequest of the property in suit to W. G. Mulder to the extent of a life interest therein, and that upon the death of W. G. Mulder his children succeeded jointly to the full ownership thereof. In that view the two-sevenths thereof belonging to two of the children passed by purchase to the first plaintiffs; and another seventh passed to the third plaintiff in virtue of his wife, who was another child of the said W. G. Mulder. And also in that view W. G. Mulder had no power to execute the three mortgages in any way to affect the plaintiffs: Grotius, bk. ii. c. 20, s. 12 (Juta, ed. 1878, p. 145); Van Leewen, vol. 1 (Kotze), p. 376; 2 Burge, 142. 105. 112. Even if the instrument in question were one of sale and purchase, still, under the true construction thereof, W. G. Mulder had no power to alienate or execute the three mortgages in question. Upon the effect of the prohibition against alienation contained in the instrument as including mortgages within its scope, see 2 Burge, 129; 3 Burge, 165; 2 Van Leewen, note to p. 85 (Kotze), bk. iv. c. 12; Sande, pt. 3, c. 3, s. 18; 2 Van Leewen, p. 83, c. 12; Van Zyl's Judicial Practice in South Africa, p. 544, c. 33 (ed. 1893). Then, as regards the effect of a breach of the prohibition, they contended that it vested the property in the person in whose favour the prohibition is made—i.e., it works a forfeiture: Sande, pt. 3, c. 4, p. 54, s. 8; also, c. 5, p. 56, ss. 1–9 and 10. In this case the parties to take are the legal heirs of W. G. Mulder, from some of whom the appellants derive title: see 1 Van Leewen, p. 379; Grotius, bk. 2, c. 20, s. 12; Voet, bk. 36, tit. 1, s. 30, and s. 28 (McGregor's translation, p. 81).

Warrington, K.C., and *Mackarness*, for the respondents,

contended that the instrument of September 24, 1881, was an instrument of sale and purchase which passed to W. G. Mulder his share of the property comprised therein absolutely. He received immediate possession thereof and became the owner, and as such entitled to dispose of it subject only to the condition contained therein; which must be construed strictly against the seller and in favour of the purchaser: Voet. xviii. 1, 27; 2 Burge, 113. The effect of that condition was only to prohibit an absolute alienation to a stranger. It did not limit his right to execute the three mortgages in question. They did not amount to an alienation until further acts were done in the nature of judicial sale or foreclosure. Until then they were merely hypothecations as security for money lent which would cease to be of effect when the money was paid. They were inchoate and not completed alienations, and were not within the scope of the prohibition. The appellants' title (if any) was under W. G. Mulder's will, and therefore subject to the mortgages if valid. Under the instrument of 1881 no one of the "legal heirs" had anything more than a spes successionis: see 3 Burge, p. 199; Sande, pt. 3, c. 4, s. 8; c. 5, s. 7; pt. 4, c. 1, s. 8; Voet (McGregor), xxxvi. s. 29, p. 78.

Nevill, K.C., replied.

1903 *Feb.* 10.

The judgment of their Lordships was delivered by

SIR JOHN BONSER. This is an appeal from a judgment of the Supreme Court of the Cape of Good Hope dismissing the plaintiffs' action.

The only question involved arises on the construction of a document in the Dutch language. The facts are not in dispute, and are as follows: On September 24, 1881, J. J. Mulder and his wife (who were married in community) executed the document above referred to, of which the following is the translation annexed to the plaintiffs' declaration:—

"On the 24th September, 1881, we the undersigned declare to have bequeathed to our son Willem Gerhardus Mulder one-sixth share in lot No. 53 of the farm Armoed . . . . We bequeath the said share for the sum of 300*l.* sterling with interest at 6 per cent. per annum, but after the death of the

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first dying of us the interest shall be decreased to 3 per cent. The said ground shall never be sold or parted with in favour of a stranger, but shall permanently remain among legal heirs. This bequest shall be attached to the deed of transfer."

The Acting Chief Justice states in his judgment that the penultimate clause might be more correctly translated: "The said ground shall never be sold or disposed of to a stranger, but shall continue to remain among the legal heirs"; but, as he observes, the difference between the translations is not very material. Although the document uses words appropriate to a will, it seems to have been always treated as a contract for sale. In March, 1882, J. J. Mulder and his son Willem G. Mulder made the declaration required by law to be made by purchasers and sellers respectively and paid the transfer duty, and a portion of land representing one-sixth of the farm was demarcated and taken possession of by Willem G. Mulder. J. J. Mulder died on June 2, 1890, and in the following month his testamentary executors executed a transfer deed conveying the land to Willem G. Mulder, and containing a recital that J. J. Mulder had sold the land to the transferee in his lifetime, and an acknowledgment that the estate had received the purchase-money. A contemporaneous arrangement of the same nature was made by J. J. Mulder with each of his other three sons, by which like portions of the farm were made over to them respectively. What the object of these arrangements was does not clearly appear. They may have been made with a view of avoiding payment of legacy duty; but, whatever the object, it is clear that the transaction was in the nature of a family arrangement for value, and not a gift nor an ordinary case of sale and purchase. It seems to have been intended that the sons should have immediate possession of their shares, subject to annual payments to be made by them to their parents, but that they should not get a title until the death of their surviving parent.

Willem G. Mulder executed a mortgage bond dated August 11, 1894, to one Richard Gavin to secure 500*l.* and interest, and again on August 15, 1896, to one Anna Catharina Hester Mulder to secure 100*l.* and interest, and, thirdly, on April 26,

1897, to the defendant James Alexander Foster to secure 305*l.* and interest. It is admitted that the mortgagees took their securities with notice of the document of September 24, 1881.

Willem G. Mulder died on July 8, 1899, leaving him surviving seven children, one of whom, Anna Maria, is the wife of the plaintiff Olivier, and having by his will disposed of his immovable property in favour of his wife and children. Since his death two of his sons, Johannes Jacobus and Mattheus, had become insolvent, and their interests (if any) in the property described in the document of September 24, 1881, have been purchased in the insolvency proceedings by the plaintiff Chiam Josef, subject to a mortgage created by Mattheus before his insolvency in favour of the plaintiffs M. Josef & Co.

In this state of things the present action was instituted. The plaintiffs, Chiam Josef and M. Josef & Co., represent between them the interests of the two insolvent sons of Willem G. Mulder, and the plaintiff Olivier represents his wife, one of Willem G. Mulder's children. The defendants are the testamentary executrix of Willem G. Mulder and the persons in whom the three mortgages created by Willem G. Mulder in his lifetime are now vested.

The action was framed on the theory that the heirs of Willem G. Mulder took vested interests in the property subject to a life interest in Willem G. Mulder, and the plaintiffs accordingly claimed a declaration that the plaintiff Chiam Josef was entitled to two-sevenths as the purchaser of the interests of the two insolvent sons, and the plaintiff Olivier to another one-seventh in right of his wife. They also asked for an order declaring that the mortgages were null and void and a direction for their cancellation. It is obvious that the latter part of the claim could not be supported, for the utmost the plaintiffs could possibly be entitled to in any event would be to have the shares claimed by them transferred to them free from and unincumbered by the mortgages.

Their Lordships are of opinion that the effect of the document of September 24, 1881, followed by the transfer deed of 1890, was to vest the property in Willem G. Mulder, subject to

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a prohibition against its alienation either by act inter vivos or by will to any person not a member of his family, and that in the absence of such alienation no person had any cause of action or any right to complain. The prohibition created what is termed a "fidei commissum conditionale," that is to say, a fidei commissum conditioned to come into existence on a breach of the prohibition (Sande, De prohibita rerum alienatione, iii. 4. 11). The question whether or not the prohibition was a perpetual one was not discussed, and cannot be decided in the present proceedings. It was not suggested that Willem G. Mulder's will was a contravention of the prohibition, but counsel for the appellants contended that the mortgages made by Willem G. Mulder were alienations and breaches of the prohibition and gave an immediate right of action to his nearest heirs, which would support the present action as far, at all events, as regards the plaintiff Olivier. They relied on certain passages in the treatise just cited (iii. 4, ss. 8 and 11), which state in effect that if the person who is prohibited from alienation alienates in breach of the prohibition, the dominium of the property so alienated passes forthwith out of him into the person or persons in whose favour the prohibition was imposed, who can sue at once to vindicate the property without waiting for his death. Although, no doubt, Sande considers that a mortgage, as being an inchoate and potential alienation, cannot validly be made by a person prohibited from alienation (op. cit. iii. 3. 18), yet it does not follow that a mortgage (which is a mere charge not passing the dominium) is a breach of the prohibition of the same nature and entailing the same consequences as an act by which the dominium passes, e.g., a sale, donation, or testamentary bequest. Their Lordships have not been referred to any express authority for such a proposition, and they are not inclined so to hold in the absence of such authority. Indeed, it would appear that if the person prohibited from alienation sells the property with an option of repurchase which he afterwards exercises, that is not a breach of the prohibition, though it is otherwise where the property is sold absolutely, even though he subsequently repurchase it (Sande, op. cit. iii. 4. 9). The charge imposed by a mortgage can only be enforced

by a judicial sale, and until such sale has been effected the property charged cannot be said to have been "sold or disposed of to a stranger." In the present case no attempt has been made to enforce the mortgages against the property, and such an attempt may never be made, for it may be that the mortgages have already been, or may hereafter be, satisfied out of the assets of the mortgagor.

For these reasons their Lordships are of opinion that the action was rightly dismissed, and will humbly advise His Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

It was suggested that Mrs. Olivier at all events was entitled to a share under Willem G. Mulder's will; but this action was not brought to assert any such claim.

Their Lordships, however, think it right to add that the dismissal of the action is to be without prejudice to the plaintiffs' rights, whatever they may be, under the will of Willem G. Mulder.

Solicitors for appellants: *Williamson, Hill & Co.*
Solicitors for respondents: *Bannister & Reynolds.*

[PRIVY COUNCIL.]

J. C.* 1903 *Feb.* 3; *March* 4.

AITKEN, SPENCE & CO. . . . . PLAINTIFFS;

AND

FERNANDO . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Ordinance 2 *of* 1889 (*C. C. P.*), *ss.* 676, 677, 685, 691—*Reference by the Court of a pending Action—Ex parte hearing by Arbitrator—Validity of Award.*

Where the subject of an arbitration is an action in Court, ss. 676, 677, 685, and 691 of the Civil Procedure Code are applicable. Thereunder the parties state in writing the matter to be referred, the Court refers to an arbitrator agreed on the matter in difference, the award is filed in Court and receives the effect of a judicial decree, and can only be set aside for corruption and misconduct of the arbitrator:—

Held, that the respondent was not entitled at his own option to withdraw from such a reference, and if he did so it was not misconduct in the arbitrator to proceed therein to award.

APPEAL from three judgments or orders of the Supreme Court (1.) dated July 4, 1900, setting aside an order of the District Court of Colombo dismissing the respondent's petition to annul an arbitrator's award; (2.) dated September 19, 1900, setting aside a decree of the District Court giving effect to the award; (3.) dated March 29, 1901, recalling a certificate granted by the Supreme Court preparatory to an appeal to the Privy Council.

Special leave to appeal was granted by Order in Council dated August 8, 1901.

The suit was for damages for breach of certain contracts for delivery at certain specified dates of goods to the plaintiffs, and for balance due in respect of advances made. The defendant claimed in reconvention the price of goods delivered. Both sides jointly moved therein that all matters in dispute be referred for final decision to Wendt, advocate, as sole arbitrator. A formal order was made to that effect under

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

s. 677 of the Civil Procedure Code (Ordinance 2 of 1889). The respondent before the first sitting of the arbitrator wrote a letter to the arbitrator professing to withdraw from the arbitration, and to revoke his mandate to him. The arbitrator thereupon proceeded ex parte, made his award in writing, and submitted it to the District Court, dismissing the defendant's claim in reconvention, and adjudging that he should pay the plaintiffs Rs.47,745.

A petition by the defendant to set aside this award having been dismissed, the District Court decreed in terms of the award.

In appeal the Supreme Court declared the award a nullity, and remitted the case for further proceedings on the ground that the arbitrator by proceeding ex parte had "misconducted the arbitration by disregarding a principle of law which has been exhumed from Voet." The passage referred to is in Voet's Commentarius ad Pandectas, lib. 4, tit. 8, § 15, to the effect that an award must be made in presence of both parties, unless it has been specially expressed in the agreement for reference that it may be made in the absence of either of them, and that, if made in the absence of either party, it is ipso facto null, even though the absent party, having been duly cited, is in default.

Asquith, K.C., Berwick, and *F. H. M. Corbet*, for the appellants, contended that the Roman-Dutch authority relied upon was not the existing law in Ceylon on this subject, having been superseded by the Code of Civil Procedure (Ordinance 2 of 1889), and that otherwise it was inapplicable to the case where the reference to the arbitrator is by the Court whose award has to be reported thereto. They further contended that under the Civil Procedure Code the award had been duly published, and that there had been no misconduct within the meaning of that Code by the arbitrator. Reference was made to c. 51 of the Code. To hear an arbitration ex parte after due notice is not such misconduct as is contemplated by s. 691, or at all. The arbitrator carried out the arbitration in obedience to the order of Court and in the manner directed by s. 682. Misconduct

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by an arbitrator is not defined by the Code, but is used in conjunction with the word corruption.

Haldane, K.C., and *R. W. Lee*, for the respondent, contended that the arbitrator had been guilty of misconduct within the meaning of s. 691 (*a*). He did not conform to the procedure prescribed thereby. Sects. 682, 685, and 686 prescribe the course which he ought to have taken. He should have applied to the Court for process; then, if the respondent failed to appear, he might have proceeded ex parte, should have made a decree nisi, and then, if the absence continued, made it absolute. The award should either have been set aside entirely under s. 691 or 692; or the Court should have at least remitted it under the later section. Reference was made to *In re Rouse & Meier* (1) in support of the respondent's claim to revoke his submission; and to *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (2) as to the strictness with which deeds of submission should be construed. It results that the respondent was entitled to withdraw, and that having withdrawn the arbitrator had no right to proceed, and was guilty of misconduct in doing so.

Counsel for the appellants were not heard in reply.

1903 *March* 4.

The judgment of their Lordships was delivered by

LORD SHAND. The facts of this case are clear, and easily stated, and do not admit of doubt or dispute.

In June, 1899, the appellants and their partners raised an action against the respondent, concluding for damages (Rs.51,254 19*a*.) in respect of the respondent's alleged breach of contracts to supply them with quantities of plumbago, which he had sold and contracted to deliver to them between March and November, 1898. After crediting the respondent with the value of the deliveries made by him under these contracts, which were all in writing and produced, the appellants claimed the amount of damages just specified as the loss sustained by them through the failure of the respondent to supply the quantities contracted for, with interest on part of their claim from January, 1899.

(1) (1871) L. R. 6 C. P. 212. (2) (1855) 6 Moore's Ind. Ap. Ca. 134.

The respondent in defence to this action denied liability, and claimed in reconvention the alleged unpaid value of plumbago delivered by him to the appellants.

The parties did not proceed to the trial of the action in Court in the ordinary course, but agreed and requested that an order for reference to an arbitrator should be made by the Court. The mandate to the proctors to apply to the Court for an order of reference was signed by the appellants, Messrs. Aitken, Spence & Co. and the partners of that firm, and by the respondent himself, and proceeded on the statement that the parties were desirous "that all matters in dispute between us in this action should be referred to the final decision of the arbitrator hereinbelow named, viz., the Honourable H. L. Wendt, Advocate, Colombo." The application was presented to the Court by the proctors for both parties, and followed by a judicial order, in which, to use the language of the order itself, "It is ordered by and with the consent of all parties that all matters in dispute between plaintiffs and defendant in this case, including all dealings and transactions between all parties, be referred to the final determination of Mr. H. L. Wendt as sole arbitrator, who is to make his award in writing and submit the same to this Court"; and the order further provided that the arbitrator "shall have all such powers and authorities as are vested in arbitrators and umpires under the Code of Civil Procedure." It appears that the respondent Fernando had himself proposed that Mr. Wendt should be sole arbitrator, and that the appellants agreed to this. At all events Mr. Wendt became so by the order of the Court, and consented to act, and went on with the arbitration, taking the necessary evidence, oral and written, and issued his award in the appellants' favour, which was duly filed in Court.

The respondent had changed his mind as to desiring the arbitration to proceed before Mr. Wendt, and on the date when the arbitrator proceeded to take the first part of his inquiry, after notice to both parties that he would do so, the respondent's proctor sent him a notice that the respondent "withdraws from the arbitration and revokes his mandate to you to arbitrate in the matter"; and, although notice of all future

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meetings for procedure in the arbitration were sent to him, he adhered to that notice, and refrained from taking any part in the proceedings, or from appearing either himself or by his proctor before the arbitrator.

The short question to be now determined by their Lordships is whether the respondent was entitled to withdraw from the arbitration to which, and to the judicial order which was issued, he had so completely agreed, and whether the award was therefore invalid and ineffectual. This question depends entirely on the provisions of the Civil Procedure Code, which apply directly to the case, and render any reference to the authority of Voet unnecessary; and their Lordships have without difficulty come to the conclusion that under the provisions of the Code, the arbitration proceedings having been in all respects regular, the award was effectual and binding on the respondent, as the learned judge of first instance has found in dismissing the respondent's petition.

The proceedings did not originate from an agreement between the parties for an arbitration in the event of a difference arising between them in the execution of their contracts of sale, in which case the Court might have been applied to under ss. 693, 694, and 695 of the Code, under which the Court might make an order of reference and name an arbitrator in case the parties could not agree as to the nomination. The subject of the arbitration was an action in Court, a judicial proceeding entirely under the control of the Court itself. Accordingly the sections of the Code which apply to the case are the 676th, 677th and 691st. Under s. 676 the parties may by their proctors, specially authorized to do so, apply for an order of reference of the existing action. In that application, which is to be made in writing, the parties are required to state the matter sought to be referred, and by s. 677 the Court is required by order to refer to the arbitrator agreed on the matter in difference which he is required to determine. In such an arbitration of an existing action the Court under s. 682 "shall issue the same processes to the parties and witnesses whom the arbitrators or umpire desire to examine as the Court may issue in actions tried before it";

and when an award in an action has been made, it is provided by s. 685 that it shall be filed in Court. It appears from the whole of these provisions that an arbitration in an action is a judicial proceeding from the beginning to the end, in which the Court is really acting by an arbitrator in conducting the inquiry, and in giving the judgment by award, which is to receive the effect of a judicial decree.

Sect. 691 of the Code is of much importance as defining the grounds on which an award given under these sections may be impugned, and the only ground on which it is said by the respondent that under the words of the Code he can challenge the award in this case is "misconduct of the arbitrator." These words are: "No award shall be set aside except on one of the following grounds, namely, corruption or misconduct of the arbitrator."

Counsel for the respondent found the utmost difficulty in explaining what could be called misconduct on the part of the arbitrator in this case, and at length put his argument on the single ground that the arbitrator had no right to proceed at all in the arbitration because the respondent had withdrawn from the arbitration, and was entitled to do so. Their Lordships can find no reason for holding that the respondent could withdraw from a judicial order of reference in a pending action granted on his own and the other party's joint application, and no reason has been suggested in argument which could justify or warrant such withdrawal. The respondent has stated that when he signed the application he was under the bonâ fide belief that it "was a mere arrangement for Mr. Wendt to suggest terms of settlement which either party would be free to refuse to accept," and that had he known of the effect of the reference he would not have agreed to it. Their Lordships agree with both Courts in thinking that this statement is not worthy of belief; but, even if it were true, the terms of the application for the order of reference are so clear and simple as to admit of no dubiety or contradiction, or of being in any way thus explained away. It follows that the judgments of the Supreme Court ought to be reversed, with costs to be paid by the present respondent, and the judgment of the District

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Court restored; and their Lordships will humbly advise His Majesty accordingly. The respondent must pay the costs of this appeal.

Solicitors for appellants: *Davidson & Morriss.*
Solicitor for respondent: *Arthur Cayley.*

[PRIVY COUNCIL.]

J. C.* 1903 *Feb.* 18.

In re WUTERICH'S PATENT.

Practice—Prolongation—Insufficiency of Accounts.

The accounts presented to the Committee on an application for extension of a patent must be intelligible and complete, shewing what remuneration the patentee has actually received. He cannot be allowed, except perhaps in very special circumstances, to supplement them by oral evidence.

THIS was a petition by Wuterich, the patentee of "a device or appliance for tobacco pipes or cigar or cigarette holders to prevent nicotine reaching the mouth of the smoker," for a prolongation of his patent. It stated the special advantages of the invention, and also the circumstances under which the petitioner had failed to derive any benefit therefrom; that he had expended all his own means thereon, and had borrowed 1450*l.* from a friend who joined with him in the petition; and submitted that under the circumstances detailed a prolongation of seven years would not sufficiently reimburse and remunerate him.

Hans Hamilton, for the petitioner.

Sutton, for the Crown, cited *Saxby's Patent* (1); *Betts' Patent* (2); *Henderson's Patent* (3); *Hughes' Patent.* (4)

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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(1) (1870) L. R. 3 P. C. 292.
(2) (1862) 1 Moo. P. C. (N.S.) 49.
(3) [1901] A. C. 616.
(4) (1898) 15 Rep. Pat. Cas. 370.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships do not doubt that the accounts of the petitioner have been honestly kept, and that the accounts presented to their Lordships have been honestly made out by the accountant, nor do they doubt that the accountant has done his best to present the accounts in an intelligible form. Still the fact remains that their Lordships are unable to discover from the accounts put before them what remuneration the patentee has actually received. The proper course to be adopted by a patentee who wishes to put himself in a position to be able to apply at the proper time for an extension of his patent is stated very plainly in a judgment of Lord Chelmsford L.C. in *Betts' Patent.* (1) It was stated again by Lord Cairns, in perhaps stronger language, in *Saxby's Patent* (2), and it has been recently repeated in a judgment delivered by Lord Davey in the matter of *Henderson's Patent.* (3)

It would be idle to read those passages once more, or to go through the cases again.

It seems clear to their Lordships that the petitioner in this case has not done what he ought to have done. The accounts submitted to the Attorney-General and presented to this Committee must be intelligible and complete. It is not competent for an applicant for the extension of his patent, except perhaps in very special circumstances, to recast or supplement the accounts which he has lodged by oral evidence at the hearing.

Their Lordships are, therefore, unable to advise His Majesty to extend the patent.

Solicitors for petitioner: *Allingham & Heys-Jones.*
Solicitor for the Crown: *The Treasury Solicitor.*

(1) 1 Moo. P. C. (N.S.) 49. (2) L. R. 3 P. C. 292.
(3) [1901] A. C. 616.

[PRIVY COUNCIL.]

J. C.* 1903 *Feb.* 3; *March* 25.

WALKER . . . . . DEFENDANT;

AND

SIMPSON . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Civil Service Act, 1884, *s.* 48—*Construction—Additional Years of Service need not be continuous—Terms of Special Leave allowing Respondent to cross-appeal without Petition—Costs.*

Where an officer within the meaning of the New South Wales Civil Service Act, 1884, held office as a civil servant from 1857 to 1861, then was employed by the Government from 1861 to 1880 as a licensed surveyor but not as an officer as aforesaid, then as an officer from 1880 to 1896, when he was superannuated:—

Held, that the years of service from 1857 to 1861 were additional years within the meaning of s. 48, entitling him to a superannuation allowance in respect thereof. There was nothing in the Act to shew that the service in respect of which allowance was provided must be continuous.

Special leave granted on special terms as to costs, reserving to respondent a right to cross-appeal without petition to that effect.

APPEAL by special leave from an order of the Supreme Court (Nov. 7, 1901) on a special case stated by consent under the Common Law Procedure Act, 1899, s. 55, so far as it decided that the plaintiff, a late member of the Civil Service, was entitled to superannuation allowance under the terms of the Civil Service Act, 1884, in respect of a period from 1857 to 1861.

The respondent was sued, under the circumstances stated in their Lordships' judgment, on behalf of the local government under the "Claims against Government and Crown Suits Act, 1897."

The Supreme Court in deciding that the respondent was entitled to additional allowance in respect of the period from 1857 to 1861, although in their view his service was not continuous, followed the decision given by the Supreme Court of

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

Victoria in 1881 in *Payne* v. *Reg.* (1) on the construction of a similar enactment—25 Vict. No. 160, s. 44 (Victoria)—which entitled the petitioner as a superannuated officer to an annual allowance, and an addition thereto "for each additional year of service." That decision was approved, though it was not necessary to decide the precise point, by the Supreme Court of New Zealand in 1889 in *Williams* v. *Reg.* (2)

Special leave to appeal was granted upon the appellant submitting to pay to the respondent his costs of the appeal as between solicitor and client in any event, if their Lordships on the determination of the appeal so direct, and that the respondent be at liberty in any printed case lodged by him to raise such objections or questions as he may desire to or concerning the said judgment of the Supreme Court without presenting to His Majesty in Council any formal petition in that behalf.

Wise (*Attorney-General of New South Wales*) and *Vaughan Hawkins*, for the appellant, contended that the respondent was not entitled to any allowance in respect of the years 1857 to 1861. His two services of 1857 to 1861 and 1880 to 1896 were wholly unconnected, and separated from each other by a period of nineteen years. The first period was terminated by the respondent himself in order that he might take other employment. According to the true construction of ss. 48 and 52 of the Civil Service Act, 1884, the service must be a continuing one up to the time when the officer becomes entitled to the superannuation allowance. It was not intended to include a former service which came to an end many years before the commencement of the later one, more especially when it did not come to an end from age or infirmity, but by voluntary resignation. The cases relied upon by the Supreme Court had been rightly decided.

Cohen, K.C., and *Butterworth*, for the respondent, contended, under the liberty reserved to them by the terms of the special leave, that the respondent had been in the service of the Government for one continuous term from 1857 to 1896. In

(1) (1881) 7 Vict. L. R. Cases at Law, 55. (2) (1889) 7 N. Z. L. R. 435.

J. C. 1903 WALKER v. SIMPSON.

other words, the Court below was wrong in disallowing the claim made in respect of the years 1861 to 1880. Each year of that period was an additional year of service within the meaning of s. 48 of the Act of 1884, whether he was an officer within the meaning of s. 2 or not. The Act of 1884 must be read with the Public Service Acts of 1895 and 1899: see the interpretation of "officer" in the former of those two Acts, in the exception from which a licensed surveyor is not included. The respondent had served for thirty-nine years as an officer within the meaning of those Acts, and under the latter Act he was entitled to a superannuation allowance in respect of all of them.

Counsel for the appellant were not heard in reply.

1903 *March* 25.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal on behalf of the Government of New South Wales against a judgment of the Supreme Court dated November 7, 1901, so far as it decides that the respondent, who was plaintiff in the action, became entitled on his retirement from the New South Wales Civil Service to superannuation allowance in respect of a period extending from 1857 to 1861, called in the proceedings "period A."

The right of a civil servant in the position of the respondent to superannuation allowance is derived under the Civil Service Act, 1884. The allowance according to scale is payable to any "officer" as defined by the Act who fulfils certain prescribed conditions. The term "officer" is explained as meaning "any person holding office in the Civil Service" other than persons belonging to certain classes in which the plaintiff is not included. The term "Civil Service" is defined as "the body of persons now or hereafter appointed to permanent salaried offices in the service of the Government," with certain exceptions not material to the present question.

It is not disputed that during the period A the respondent was an "officer" within the meaning of the Act of 1884.

In 1861 the respondent gave up his position as a permanent salaried officer, and obtained the appointment of licensed sur-

veyor. Licensed surveyors are not salaried officers, nor are they members of the Civil Service. Though in the employment of the Government, they are at liberty to undertake private business. When employed on Government business, they receive separate instructions for each piece of work, and are paid separately for every job. The period of the respondent's employment as licensed surveyor continued up to 1880. It is called "period B."

In 1880 the respondent was again appointed to a permanent salaried office in the service of the Government. He remained in the service as a permanent salaried officer until July, 1896. In that month he attained the age of sixty, and was then compulsorily retired under s. 68 of the Public Service Act, 1895.

The respondent on his retirement claimed compensation allowance in respect of a term of service made up of the three separate periods A, B, and C. His claim in respect of period C was admitted, but the Government refused to give him credit for periods A and B or either of them. His claim in respect of B was rejected on the ground that during that period he was not an "officer." His claim in respect of A was disallowed on the ground that no claim to superannuation allowance could be admitted except in respect of continuous service.

The whole question turns on s. 48 of the Act of 1884. Reference was made in the course of the argument to several other sections of the Act and to the Public Service Act, 1895; but after some discussion it became plain that little or no light could be thrown upon the question by anything in the Act of 1895, or any other sections of the Act of 1884.

Sect. 48 of the Act of 1884 declares that the "following shall be the scale of superannuation allowances payable under this Act, viz.:—To any officer who shall have served fifteen years, a superannuation allowance equal to one-fourth of his annual salary, with an addition of one-sixtieth part of such salary for each additional year of service, but in no case shall such superannuation allowance exceed two-thirds of his annual salary, and such superannuation allowance shall be computed upon the average annual amount of salary or emoluments other than

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forage, equipment, or travelling allowance received by such officer during the preceding three years."

Confining their attention to this section, the learned judges of the Supreme Court expressed their unanimous opinion that there was nothing to shew that the service in respect of which superannuation allowance was provided must be continuous. Their Lordships agree entirely in that conclusion. Indeed the point appears to them too clear for argument. It is difficult to see why the years of service included in period A are not just as much "additional" years of service as the years included in period C, other than those that go to make up the term of fifteen years which gives the right to superannuation allowance. It may be observed that in s. 47, where the Act is dealing with a service terminated by ill-health and afterwards resumed on recovery, the expression "additional length of service" is applied to the period of further employment, though not continuous with the service, in respect of which superannuation allowance had already been earned.

The respondent, as he was entitled to do under the terms of the order giving the appellants special leave to appeal, renewed his claim to superannuation allowance in respect of period B. But the obvious and conclusive answer to that claim is that the respondent was not during period B an "officer" within the meaning of the Act of 1884.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed.

In accordance with the undertaking given when special leave to appeal was granted, the appellant will pay the costs of the respondent as between solicitor and client.

Solicitors for appellant: *Light & Galbraith.*

Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

KENSINGTON LAND COMPANY AND OTHERS . . . . . } DEFENDANTS;

AND

CANADA INDUSTRIAL COMPANY . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

J. C.* 1902 July 11, 14, 15. 1903 March 28.

Civil Code of Lower Canada, art. 1092—*Cause of Action—Insolvency of Debtor.*

Under art. 1092 of the Civil Code of Lower Canada an action to recover the balance of purchase-money of land may be brought although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security.

APPEAL from a decree of the above Court (May 29, 1901) affirming a decree of the Superior Court at Montreal (March 9, 1900).

On September 3, 1898, the respondents commenced an hypothecary action against the appellants, the Kensington Land Company, under the circumstances stated in their Lordships' judgment, claiming that (by reason of the company having diminished the respondents' security in and over certain lands, namely, lots 155 and 163, in the parish of Notre Dame de Grâces, in their possession, and by reason of the company being insolvent) the said lands should be declared to be charged with and hypothecated for the payment of $16,379·17 with interest, and that in default of payment the lands should be sold by auction. The sum of $16,379·17 was made up as follows: $15,893·34 balance of purchase price of the said lands, $395·83 interest on the same from April 1 to September 3, 1898, and $150 paid to the widow Leduc.

The appellant company by their plea denied that there were any moneys due or that they were insolvent, and alleged that the action was unfounded.

After replication and on June 14, 1899, the appellants Buller

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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and three others (these latter being the liquidators of the company) intervened in the action. They alleged that by reason of an offer made by Buller on March 22, 1898, for the acquisition of the entire assets of the appellant company, which offer was duly accepted by the shareholders, but the carrying out of which had been unduly and improperly delayed, they were entitled to the property and assets of the appellant company, and that the respondents' action was unfounded and unjustly and illegally interfered with the interveners' rights, and should be dismissed with costs. The respondents denied these allegations, and alleged that they had always been ready to withdraw the action provided the interveners would pay all claims, interests, and costs which were past due in such a way as to keep priority of hypothec to the respondents, and not to get parties to pay for the appellant company with subrogation, and that unless and until the interveners paid or deposited whatever might be due to the respondents in capital, interest, and costs, they had no right to ask the dismissal of the hypothecary action.

The judgment of Lemieux J., which was affirmed by the Court of King's Bench, was, so far as material, as follows:—

"The object of the Kensington Company was to sub-divide the property acquired from the Canada Company into a larger number of lots, and to resell such lots for building purposes. The object in view of the appellant company was a common and lawful speculation. The beginning was unsuccessful, and the enterprise has been discouraging. After a few years of stagnation the company was, even before January, 1898, unable to meet its daily requirements, to pay the running accounts, the municipal taxes, and the interest on the mortgages, so much so that some of the directors have in numerous cases made advances out of their own private money to satisfy those sundry claims, the total of such advances amounting at times to $3000. . . . .

"The investigating committee addressed a circular letter to the shareholders informing them that the company was in immediate need of (1.) about $4500 to pay the current accounts; (2.) about $1100 to meet the interest maturing on April 1,

1898; (3.) about $16,062·27 for mortgages and interest thereon maturing on October 1, 1898, besides the current expenses of the company. In all $21,662·27. The circular added that the resources of the company to meet these liabilities consisted of (1.) about $600 expected to be collected for interest on April 1, 1898; (2.) perhaps $5000 on October 1, 1898; but that even supposing all these expectations were fulfilled, there would be on October 1, 1898, a deficit of $5000 on the present outstanding and near future debts, and $11,000 based upon the mortgage due on October 1, 1898.

"Nobody answered the appeal of the committee. The evident decay of the affairs of the Kensington Company was the cause that not a single one of the directors nor of the shareholders would dream of making any more personal sacrifices in the way of more advances in money or additional instalments on their shares in order to relieve the situation. Consequently, on February 24, 1898, the directors resolved to place the company in liquidation . . . . When the company was placed in liquidation it had ceased making its payments, and it could not meet its obligations. Being a joint stock company, and, consequently, a commercial company, in the sense of art. 1864, Civil Code, it had become bankrupt before March 9, 1898, and it has been bankrupt up to September 3, 1898 (date of the commencement of the action), and is still bankrupt . . . . A voluminous enquête has been made relating to the real value—that is, the value which could be realized on the immovables of the Kensington Company.

"The respondents' witnesses, nearly all disinterested and competent to give evidence on that point, have declared that those immovables considered as a farm or as building lots had lost from one-half to three-fourths of their value; the effect of which would be to endanger and place in peril the hypothecary claim of the respondents; for taking as a basis of the value of this property the price obtained by the deed of sale of 1893—namely, $88,000—that property, if it has really lost one-half of its value, as has been proved, would realize at the utmost $44,000, whilst the hypothecary claims set out in the deed of 1893, and admitted by the appellant company, amount to the

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sum of $58,833·34, leaving a deficit of over $14,000; and, consequently, the claim of the respondents is without security or guarantee for the greatest part. The defendant company attempted to displace the evidence of the Canada Company, and to prove that the property had not been depreciated. This proof has not the character of precision and lucidity which the plaintiffs' proof has . . . .

"This claim of Buller is one of the most convincing proofs of the great diminution in value and depreciation of the property, for he buys without assuming any personal liability, without being liable for the simple contract debts of the company, but only with the pretended obligation of being liable only hypothecarily.

"That cession, if made as stated by Buller, would possess neither the characteristics nor the worth of a sale, for no price was stipulated as is essentially required for a sale. It would only amount to an agreement by which an owner would have bound himself to deliver his property to a third party, the latter binding himself to nothing outside of taking possession of the property and allowing the hypothecary creditors to direct their suits against him, and allowing the sale of the property to be executed against him, the creditors to be paid out of the proceeds of the sale only . . . .

"A very significant fact as regards the value of the property is that not a single offer has been made to the appellant company for the purchase of these lots . . . ."

Haldane, K.C., and *Brosseau, K.C.*, for the appellants, after contending that upon the evidence there was no balance of purchase price due to the respondents, and that in any event there was nothing payable in respect thereof at the date of action brought, submitted that art. 1092 of the Civil Code had no application to a case like the present, where there is no personal liability on the part of the holder of the land subject to hypothec. That article is comprised in c. 7 of the Code headed "Of different kinds of Obligations," and only applies where there is a debtor who is personally liable for the debt. Besides, the owner of a mere hypothecary charge upon land

cannot be affected by the bankruptcy or insolvency of the owner of the land, seeing that the charge remains unaffected by it. And, assuming that art. 1092 applied, it was contended that on the evidence there was neither bankruptcy nor insolvency of the appellant company at the date of action, nor had there been any depreciation in the value of the property hypothecated which could be fairly ascribed to the acts of the appellant company. It should be ascribed to general causes or to acts of the company which come within the contemplation of all parties at the time of the sale.

Loehnis and *Geoffrion*, for the respondents, contended that the Courts below were right in concurrently finding that there was a balance due by the appellant company of $16,379 with interest at the date when the action was brought; that the appellant company had diminished the value of the respondents' security, and was insolvent. They relied upon art. 1092 of the Civil Code.

Haldane, K.C., replied.

1903
March 28.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal from a judgment of the Court of King's Bench for the Province of Quebec, affirming two judgments of the Superior Court for the province.

The litigants are two companies—the appellant company is a building company, and the respondent company is a mining company. The appeal arises out of a sale of certain land made by the respondent company to the appellant company. The second judgment is against the liquidators of the building company, who intervened in the action.

The action was brought by the respondent company on September 3, 1898, and the intervention was on June 14, 1899.

The facts, so far as they are material to this appeal, appear to be that on September 13, 1893, the respondent company sold to the appellant company through one Bland certain property, part of which was subject to a life-rent payable to a widow named Leduc.

$15,833·34, balance of the purchase-money, was payable in ten years from October 1, 1893, with interest from that date at

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the rate of 5½ per cent. per annum, payable half-yearly, and the vendor reserved all rights to secure payment of the balance and the interest thereon.

On December 15, 1893, Bland conveyed his purchase to the appellant company, on whose behalf he had purchased.

The action was brought by the respondent company for the balance of the purchase-money, and in respect of half a year's annuity, part of the charge upon the land which it had paid to Mme. Leduc, to which the respondent company was duly subrogated.

The action was brought, although the time for payment had not arrived, under art. 1092 of the Civil Code of Lower Canada, which permits the bringing of such an action when the debtor has become insolvent, or when he has diminished the value of the security.

The two allegations involved in the right to bring the action were contested by the appellant company as matters of fact, namely, the allegations that the appellant company had diminished the value of the security and that they were insolvent. A considerable body of evidence was given upon the subject, and both the Courts have found the two propositions to be proved.

Their Lordships see no reason whatever for differing from the conclusion in this respect found by both Courts after a lengthened investigation of the facts.

This disposes of the plea, which in substance amounts to the allegation that the action was brought prematurely and before the balance alleged could be demanded.

But the appellants further allege as a defence that the price which on the face of the contract of sale was $110,000 was only $88,000. Lemieux J. has investigated the facts in relation to this plea, and they appear to be that the figures in the deed of sale were incorrectly given in two respects: the price was $88,000 and not $110,000, and the money paid was not $50,000 but $28,000. This appears to have been done by the syndicate who were forming the appellant company under the instructions of Bland to enable $22,000 to be added in terms to the price to be divided among themselves.

To the respondent company it made no difference whatever. Their balance was in either case the same, namely, $60,000.

Neither the respondent company nor any of its agents had anything to do with the matter, and from 1894, when the settlement was arrived at and every detail of the circumstances was known to the appellant company, no attempt was made to set aside the sale or to obtain any redress, but the contract was adhered to and acted upon, and it is much too late to set it up now as an answer to an action on a balance, which is the true balance due upon the contract, even if it could ever have been made available for any such purpose.

The account given by those responsible for the augmentation of the figures was that it was to prevent the extra expense of several deeds and the difficulty of adjusting the claims of the syndicate among themselves.

A number of persons engaged in this operation appear to have had differences with the appellant company and with each other upon this very question of misrepresentation of the amount, and in some form of arbitration the differences were adjusted between the members who were shareholders and the syndicate by the surrender of some of the shares and the payment of the costs of the proceedings.

With respect to the intervention of Buller and others long after the commencement of the principal suit, it is unnecessary to say more than that the learned judge who tried the cause found, upon what their Lordships are of opinion was ample evidence to justify such a finding, that the intervention was merely a colourable proceeding for delay. No money was forthcoming for the payment of anything. The learned judge held that the offer itself was not bonâ fide, and the only object of the intervention was to embarrass and delay the creditors of the company.

Under these circumstances their Lordships will humbly advise His Majesty that this appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Simpson & Co.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[PRIVY COUNCIL.]

J. C.* 1903 *Feb.* 18, 19; *March* 20.

KENT AND OTHERS, LIQUIDATORS OF LA BANQUE VILLE-MARIE . . . } PLAINTIFFS;

AND

LA COMMUNAUTÉ DES SŒURS DE CHARITÉ DE LA PROVIDENCE AND OTHERS . . . . . } DEFENDANTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Canadian Winding-up Act, 1886, *ss.* 15 *and* 31—*Restricted Power of Liquidators of Bank to sue in their own Names—Civil Procedure Code, ss.* 516 *and* 521—*Power to amend by adding Bank as Plaintiffs.*

Under the Canadian Winding-up Act, 1886, ss. 15 and 31, a company in liquidation retains its corporate powers including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name or in that of the company, according to the nature of the action: in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debts or its property.

Where liquidators sued in their own name to recover a debt due to the company:—

Held, that the error was one of form, which the Court had power to give leave to amend under ss. 516 and 521 of the Code of Civil Procedure. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion.

APPEAL from a decree of the above Court (Feb. 25, 1902) affirming a decree of the Superior Court of Montreal (April 1, 1901) dismissing the appellants' action.

That action was brought by the liquidators of the Ville-Marie Bank, using their individual names, but alleging their official capacity, and claiming $20,000 with interest. To this the respondents pleaded payment by set-off, alleging that they had at the bank offered to pay the amount in part by means of

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

cheques drawn upon deposits actually due by the bank; and as to the balance by cash then duly tendered.

After trial of the case judgment was reserved on February 4, 1900, by Pagnuelo J.

No suggestion had been made, by pleading or in argument or from the bench, as to the form of the action or the capacity and right of the appellants to sue in their character of liquidators of the bank.

But at a later date Pagnuelo J. ordered a rehearing on the question, which had occurred to him meanwhile, of the right of the appellants to bring the action in their own names as liquidators. The appellants thereupon moved for leave, if necessary, to amend the proceedings; and that motion came on together with the rehearing.

Eventually both motion and action were dismissed on the following grounds:—

"Considering that the Winding-up Act declares (s. 15) that the corporate state and all the corporate powers of the company shall continue until all the affairs of the company are wound up, and (s. 31 (*a*)) that the liquidator may with the approval of the Court sue in his own name as liquidator or in the name of the company as the case may be; that the present action appertains to the bank and not to the liquidators as representing the creditors, and ought to be taken in the name of the company; that no person can plead with the name of another, and that corporations plead in their corporate name; (art. 81, C. P. C.) and that in consequence the plaintiffs, who are only liquidators and administrators of the bank for the purposes of the liquidation, have not the capacity to bring this action in their names as liquidators; the action of the plaintiffs as liquidators is dismissed, reserving to the bank its right to protect itself, but without costs, seeing that the question was not, as it ought to have been, raised in limine."

This judgment was affirmed in appeal, Lacoste C.J. ruling as follows:—

"It has been argued that the appellants, as bearers of the note, were authorized to sue in their own names. They do not sue as holders of the note, but as liquidators and administrators.

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It is for the benefit of the bank that they have brought the action, and it appears from their allegations that it is the bank which is holder, and that they have only the custody of the note (Canadian Winding-up Act, s. 30).

"The appellants being without capacity to proceed in law under the circumstances the Court could not sustain their action any more than it could have sustained the action of an ordinary agent who had sued in his own name and for account of his principal to recover a debt belonging to the latter; this would be to violate the rule that one cannot plead by or for another. The appellants applied to amend their proceedings in such wise as to make the bank a party to the action. This application was according to sound law rejected.

"Our code of procedure does not authorize the Court to substitute one party for another by an amendment of the proceedings. This would be to substitute one action for another.

"Art. 522, C. P. C., forbids the allowance of an amendment which would change the nature of the demand; a fortiori when it concerns the action itself. Besides, how could one who has not capacity to bring the action have the capacity to amend it for the benefit of another who is not a party? The appeal should be dismissed."

Blake, K.C., and *Charbonneau, K.C.*, for the appellants, contended (1.) that the action was well brought by the liquidators in their own name as the holders of the note sued upon; (2.) that if not the Court had the power, and under the circumstances it was their duty, to allow the amendment joining the bank as a party. Upon the first point they referred to the Winding-up Act (R. S. C. c. 129), ss. 15 (2), 19, 20, 25, 29–31, 33–6, 39, 40, 47, 53, 60, 61. The appellants acted in pursuance of an order of Court obtained by them as liquidators and authorizing them to sue. They also referred to the 2nd article of art. 81 of the Civil Procedure Code, submitting that the bank had not the free exercise of its rights; that its corporate powers were only continued for the purposes of liquidation, and could no longer be exercised by the bank and its directors, but only by the liquidators acting with the

sanction of the Court. Upon the order of liquidation the note sued upon vested in the liquidators, who alone had power to sue on it. Upon the second point they contended that, if the objection were valid, it ought to have been taken as a preliminary point. Instead of doing so, the respondents had waived it by pleading set-off and paying into court the balance alleged to be due. Besides, ample power to amend was given under the Civil Procedure Code, arts. 516, 518, and 521, and on the plainest principles of justice should have been exercised. Reference was made to *Porteous* v. *Reynar*. (1)

Haldane, K.C., and *Lamothe, K.C.*, for the respondents, contended that the Courts below were right in refusing to substitute the name of the bank as plaintiff for those of the liquidators. The rules of procedure that "a person cannot use the name of another to plead except the Crown," and that "corporations plead in their corporate name," have their origin in the old French law, were adopted under the legislative union of the provinces of Upper and Lower Canada, and have been constantly recognised and acted on by the Courts. Art. 81 of the Civil Procedure Code is an expressly prohibitive law. The bank was bound to sue in its corporate name; the liquidator is merely an executive officer, and not an assignee of the effects of the insolvent bank: see s. 30 of the Winding-up Act. The prohibition applies whenever the liquidator wishes to exercise as against third parties the rights of the company itself; though it is otherwise where he acts as an officer. The Court had no power to derogate from the express law contained in art. 81 of the Procedure Code. The prohibition there contained is without exception. The order made was equitable, since it reserved to the bank the right to sue in its own name, and the liquidators were not condemned to any costs. The bank could thereupon assert its rights, and the Courts would have avoided exercising in an unprecedented way a discretion to allow the liquidators to disregard an established rule of procedure. There is no reported case where the discretionary order asked in this case has been made.

Counsel for the appellants were not heard in reply.

(1) (1887) 13 App. Cas. 120.

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March 20. The judgment of their Lordships was delivered by

LORD DAVEY. The action out of which this appeal has arisen was commenced on November 29, 1899, by the appellants, Ambrose L. Kent and two others, in their character (qualité) of liquidators of the Bank Ville-Marie, against the respondents, La Communauté des Sœurs de Charité de la Providence, to recover the sum of $20,000 alleged to be owing by the respondents to the bank on a promissory note. The Bank Ville-Marie was and is a corporation having power to sue, and it formerly carried on business in Montreal and other places, but on August 10, 1899, the bank was ordered to be wound up under the provisions of the Canadian Winding-up Act of 1886 (Revised Statutes of Canada, c. 129), and the appellants were duly appointed the liquidators thereof.

By an order of the Superior Court of September 26, 1899, the liquidators were authorized to sue (amongst other persons) the respondents for the before-mentioned sum of $20,000.

By their defence the respondents admitted the debt claimed, but alleged that it was extinguished by compensation or set-off, except as to a small balance which they offered to pay. They did not by their defence or at the bar in the course of the trial take any exception to the form of the action, and, as their Lordships were informed, no objection was suggested from the bank during the trial to the right of the liquidators to maintain the action in its present form. Pagnuelo J., by whom the action was tried, reserved judgment, and it appears to have then occurred to him that the action should have been in the name of the bank itself, and he accordingly ordered the case to be set down again for argument on that point. The appellants thereupon moved for leave to amend the summons and declaration by adding after their own description the words, "et pour et au nom de la dite Banque Ville-Marie et la dite Banque Ville-Marie en autant que besoin et aux fins des présentes," the bank submitting to be bound by the evidence already taken on either side. The learned judge dismissed the motion, and also dismissed the action, but without costs, holding that the liquidators were "sans qualité" to bring the action in their own name. This judgment was affirmed on both points by the

Court of King's Bench on February 25, 1902, and the present appeal is from the judgment of the latter Court.

The first point made by the appellants was that the liquidators were entitled to sue in their own names as liquidators. The relevant article of the Code of Civil Procedure is art. 81, which is in the following terms :—

" A person cannot use the name of another to plead except the Crown through its recognised officers.

" Tutors, curators, and others representing persons who have not the free exercise of their rights plead in their own name in their respective qualities.

" Corporations plead in their corporate name."

It was argued that by the winding-up the corporation was deprived of the free exercise of its rights, and the case therefore fell within the second clause of this article. In order to test the validity of this argument the Canadian Winding-up Act, 1886, should be referred to. By s. 15 of that Act it is provided that the company from the time of the making of the winding-up order shall cease to carry on its business except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof, and transfers of shares and any alteration in the status of the members of the company after the commencement of the winding-up shall be void, but the corporate state and all the corporate powers of the company shall continue until the affairs of the company are wound up. And by s. 31 the liquidator is empowered, with the approval of the Court and upon certain notices to creditors and others (amongst other things), to bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the company, as the case may be. The company therefore retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The words which have been quoted from the 31st section do not, in the opinion of their Lordships, confer upon the liquidator or the Court a discretion as to the mode in which he shall sue, but enable him to bring the action either in his own name or in that of the company as may be

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appropriate to the particular action. The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the company, and on the other hand he is the representative for some purposes of the creditors and contributories. There are therefore many cases in which he may sue in his own name, as, e.g., to impeach some act or deed of the company before winding-up which is made voidable in the interest of the creditors and contributories. But their Lordships think that wherever the object of the action is to recover a debt, or to recover or protect property the title to which is in the company, the action should be brought in the name of the company.

It was suggested that the liquidators were in fact the holders of the promissory notes, and as such were entitled to sue upon them in their own name. But the declaration is framed on the theory that the bank, and not the liquidators, are the holders of the notes, and leave to amend for the purpose of raising this point was asked for. The next question is whether leave to amend should have been given. The powers of amending pleadings are contained in Chapter XXIII. of the Civil Procedure Code. The learned judges in the Court of King's Bench seem to have thought that the language of the sections contained in this chapter was insufficient to authorize the amendment sought by the appellants. But it was not denied by learned counsel for the respondents at their Lordships' bar that the power was sufficient for the purpose, and it was argued only that it was a discretionary power, and their Lordships should not overrule the discretion exercised by the Court below. In the opinion of their Lordships the powers of amendment given by the Code are full and ample, and the Court had power under s. 516 to give leave to amend the summons or declaration in any way the Court might think proper. Indeed, it may be doubted whether the defect in the present case was really more than an irregularity of form which might have been cured by amendment by the judge mero motu under s. 518. The substance of the action was to recover a debt alleged to be due to the company in liquidation which the liquidators were the only proper persons to receive and give a discharge for. No defence

was available against the company which was not equally available against the liquidators, and the parties were content to fight the case out with the liquidators, who were their real opponents, and the case was in fact fought out with the liquidators without any exception to their right to sue, and was ripe for judgment. It is impossible to say that the proposed amendment changes the nature of the demand, or can in any way cause a prejudice to the respondents. In short, the liquidators are domini litis and it was not improper to make them plaintiffs, but they ought to have joined with themselves the company; or, in other words, the liquidators had the right to sue, but sued in the wrong form. It would seem, therefore, that art. 521 of the Code is applicable to the case. Their Lordships would always hesitate before interfering with the exercise of a discretion by the Court below, but in the present case the learned judges seem to have proceeded on an erroneous construction of the Code. Their Lordships will only add that their decision will not be a precedent for substituting one plaintiff for another in other circumstances, and no such injustice as the Chief Justice apprehended need be feared. All they decide is that the proposed amendment could, and in the particular circumstances of this case ought to, have been allowed in the sound exercise of a judicial discretion.

Their Lordships were asked to hear the case upon its merits; but it is not the practice of this Board to sit as a Court of first instance. No judgment has been delivered by the Court below, and they could not, without injustice to the parties, take that course, and give a decision from which there would be no appeal.

Their Lordships will, therefore, humbly advise His Majesty that the judgments of the Superior Court dated April 1, 1901, and of the Court of King's Bench dated February 25, 1902, be reversed, except so far as the judgment of the Superior Court dismissed the intervention with costs, and instead thereof it be ordered that the plaintiffs in the action be at liberty to amend their writ of summons and declaration and all necessary documents in the cause in the manner asked for by their notice of motion dated March 29, 1901, on the Bank Ville-Marie by

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its liquidators submitting to be bound by all the proceedings in the action up to and including the trial, and to the admission of all the evidence properly given on one side or the other, and not requiring any further trial, and that on such amendment being made the action be referred back to the Superior Court for judgment. There will be no costs of the appeal to the Court of King's Bench or of this appeal. The costs of the action will of course be disposed of by the Superior Court, but the costs of the motion for leave to amend, which was an indulgence, should be paid by the appellants.

Solicitor for appellants: *S. V. Blake.*
Solicitors for respondents: *Ingle, Holmes & Sons.*

[HOUSE OF LORDS.]

GARDNER . . . . . APPELLANT; H. L. (E.) 1903 May 11.

AND

HODGSON'S KINGSTON BREWERY COMPANY, LIMITED . . . . . RESPONDENTS.

Easement—Way—Prescription—Inference from Facts—Payment for User—Enjoyment as of Right—Lost Grant—Prescription Act, 1832 (*c.* 71), *s.* 2.

For more than forty years without interruption the owner of a house used a cart way from his stables through the yard of an adjoining inn to the public road, paying each year 15*s.* to the owners of the inn yard. There was no agreement in writing, and no conclusive evidence as to the origin of or the consideration for the payment:—

Held, that the inference of fact this House drew from the evidence was that the payment was made for leave to use the way; that there had therefore been no enjoyment of right within the Prescription Act, 1832, s. 2; and that there was no ground for presuming a lost grant.

The decision of the Court of Appeal, [1901] 2 Ch. 198, affirmed.

IN his judgment on this appeal Lord Ashbourne said:—

The facts in this case are meagre and inconclusive. They can be very shortly stated. For some seventy or eighty years the plaintiff's house has been occupied for business purposes with a yard and stables at its back. The only access to the yard and stables has been through a gateway from the plaintiff's yard opening into the Red Lion yard, and across that yard into High Street. During this period, at all events, the right of way has been openly, regularly, and uninterruptedly enjoyed. For the greater part of that time—it may possibly be for the entire period—the sum of 15*s.* a year has been paid by the plaintiff and her predecessors to the owner or occupier of the Red Lion. The payment has been proved to have been actually made since 1855. The plaintiff asserts that the payment has been made for the repair of the yard through which the way passed, but the evidence on the subject is very slender, indeed Cozens-Hardy J. says, "there is nothing to support the assertion." The defendants, on the other hand,

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allege that this payment has been made by way of rent in respect of the right of way.

On March 31, 1898, the defendants served notice in writing upon the plaintiff, requiring her to give up the use of the yard of the Red Lion, and to close the gate. After some correspondence, on which the defendants placed no undue or unfair reliance, and on February 16, 1899, the defendants served notice to quit and discontinue the user of the yard "on the expiration of the year of your tenancy, which shall expire next after the end of one half-year from the service of this notice."

The plaintiff, on August 11, 1899, instituted this action, claiming a declaration that she was entitled to the right of way referred to.

Cozens-Hardy J. held that the plaintiff had acquired an indefeasible right of way under s. 2 of the Prescription Act, 1832. The Court of Appeal (Vaughan Williams and Romer L.JJ., Rigby L.J. dissenting) reversed this decision and dismissed the action.

March 2, 3. *E. H. Coumbe* and *M. A. Robertson*, for the appellant, contended that the true inference from the evidence was that the 15*s.* was paid for repair of the road or use of the pump, or at all events not for the use of the way; but that however that might be the appellant had acquired an indefeasible right under the Prescription Act, 1832, or by a lost grant.

[Their contentions are set forth at length in the report below.]

Hon. E. C. Macnaghten, K.C., and *G. Cave*, for the respondents.

The House took time for consideration.

May 11. EARL OF HALSBURY L.C. My Lords, the appellant in this case claimed a right to pass through premises belonging to the respondents. The only proof given in support of the right claimed was the fact that for many years the appellant and those who preceded her in the ownership of the premises had crossed the respondents' yard along the same way to get to her own yard with carts and horses. The

respondents' premises were occupied as a public-house, and the appellant could not get to her own yard with carts and horses from her own premises.

No evidence was given as to any change in the premises, or any definite evidence when what I will call the yard opening of the Red Lion was first made use of as a convenient access to the appellant's premises. But what is conclusive, to my mind, against the appellant is that during the whole period during which this convenient access was used a sum of 15*s.* a year was regularly paid in respect of the user of the way.

One of the most common modes of preventing such a user growing into a right is to insist upon a small periodical payment, and if such evidence as we have here were permitted to be evidence of a right, not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed. Those who drafted the Prescription Act knew well what they were about when, in dealing with the consequences which have to follow from long-continued user, they used the words "as of right."

I cannot help thinking there has been a certain play upon words in commenting upon them. In a certain sense a man has a right to enjoy what he has paid for, and, therefore, if the appellant here at any time during the year when she had paid for the right to use this way had been hindered, she would have had a right to complain that what I will call her contract had been broken, and that during the year she had a right to use the way. I do not think that this would have established a right in the proper sense, because, being but a parol licence, it might be withdrawn, and her action would be for damages, but she would have no *right* to the way. And in no sense could the right be the right contemplated by the Act. That right means a right to exercise the right claimed against the will of the person over whose property it is sought to be exercised. It does not and cannot mean an user enjoyed from time to time at the will and pleasure of the owner of the property over which the user is sought. At any time after the first year the owner of the Red Lion might refuse to renew the permission

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to use this way. I think, therefore, that there is no evidence whatever of an user "as of right."

Although I do not think much importance should be attached to the appellant's view of her own rights, it is not immaterial to see what she thought she was paying 15*s.* a year for, and she thought that was what, I think, it manifestly was paid for, namely, the annual permission to use this access to her yard. If this was a permission paid for it was not the less a permission, and a permission to use a way cannot establish a right. There was no pretence for suggesting a joint reparation of the road by the parties; and I am of opinion that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD ASHBOURNE. My Lords, the case would be perfectly clear in favour of the plaintiff but for the payment of the 15*s.* a year, and to my mind the whole question in the case turns upon the meaning and significance of this payment. The plaintiff claims that she is entitled to succeed under the Prescription Act, or to have a lost grant presumed, and a great number of authorities have been discussed here and in the Courts below to suggest to your Lordships how the facts of the case should be regarded. But everything turns on the one fact, What is the annual payment of 15*s.* to be ascribed to? But for this payment the case of the plaintiff would be clear. It now stands distinctly in her way. The onus of getting rid of its obvious significance rests on her. Cozens-Hardy J. does not, I think, weaken or displace the obligation which rested on the plaintiff.

In the absence of direct evidence, all that can be said is that the payment is consistent with inferences which have been drawn by both sides. The defendants insist that the most obvious and natural inference is that it was made for rent, or for a series of annual licences, given possibly by implication. The plaintiff, on the other hand, urges that it was more probably a perpetual payment attached to some original grant of the right of way. Rigby L.J. has speculated with persuasive force on the probability of such a hypothesis. If I felt free to

speculate on the possible and probable origin of this payment, I would be glad to draw the same inference. The onus of explanation is, however, I think on the plaintiff. Her counsel were asked what liability they admitted to the continued payment of the 15*s.* a year, and they did not give any direct answer. I would be disposed to think that their main argument would require them to contend that the obligation to make this annual payment was as strong as the plaintiff's claim against the defendants to enjoy the right of way. The case must be taken as a whole—a long-used right of way with a long-continued payment, both most probably to be referred to the same origin. If this be so there must be reciprocity. If the plaintiff is entitled to get the declaration she asks for, would the defendants not be entitled with the same force to insist on the continuance of this annual payment of 15*s.*? I am of opinion, however, that the defendants would not succeed if they relied on any such contention, and that no Court would presume in their favour a lost grant establishing their right to this yearly sum. I agree with Romer L.J. on this important point.

I do not say that the case is free from difficulty, but I am unable to arrive at the conclusion that the plaintiff has discharged the onus which lay upon her of satisfactorily explaining that this payment of 15*s.* a year was consistent with her claim. I therefore think that the appeal should be dismissed.

LORD MACNAGHTEN. My Lords, if it had not been for the difference of opinion in the Courts below, I should have thought this an extremely simple case. The appellant, Miss Gardner, who was plaintiff in the action, is the owner of certain premises in High Street, Sutton, consisting of a shop and a yard at the back. The respondents are owners of adjoining premises, also facing High Street, and known as the Red Lion Inn.

For forty years and more the appellant and her predecessors in title have used the yard of the Red Lion as the way to their back premises for carts and horses; at present there is no means of access to these premises for carts and horses except through the Red Lion yard. But there is nothing to shew what was

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the condition of things when the way across the yard was first used by the then owner of the appellant's premises. For forty years and more the appellant and her predecessors in title using the way through the Red Lion yard have regularly year by year and every year paid the sum of 15*s.* to the respondents and their predecessors in title. The evidence as to this payment does not go back so far as the evidence as to the use of the way. But there is nothing to shew or suggest that the way was ever used without payment.

Those are the only materials upon which your Lordships' decision must be founded. There is no other fact proved or admitted throwing light upon the question. The connection between a certain pump in one corner of the Red Lion yard and the alleged right of way across the yard on which so much stress was laid in argument is, I think, purely imaginary. Why a person who has an admitted right to take water from his neighbour's well should found upon that right a claim to cross his neighbour's yard with carts and horses for purposes unconnected with the well is beyond my comprehension. Nor is there, I think, the slightest evidence to shew that the payment of 15*s.* a year was merely a contribution towards the cost of repairing the way. The suggestion was rejected by Cozens-Hardy J., who saw and heard the witnesses.

On the bare facts with which your Lordships have to deal there arise, as it seems to me, two questions: (1.) What was the sum of 15*s.* a year, which was paid regularly year by year, paid for? Well, I think any layman and most lawyers would answer, "For the use of the way, of course." Then comes the only other question: (2.) Can a person who uses a way across his neighbour's land, and pays for the use of it year by year, be said to use the way "as of right"? Again, I think every layman and most lawyers would answer, "Certainly not." If the way in question has not been used "as of right," there is nothing to attract the provisions of the Prescription Act. The case of the appellant, so far as it is founded on that Act, must fail. It was for the plaintiff to make out her case. If she cannot shew that the user of the way was "as of right," the essential condition of success is wanting.

The suggestion of a lost grant burdening the respondents' property with a servitude which would so greatly diminish its value, and charging the appellant's property with a rent-charge in perpetuity, is, I think, out of the question. It seems to me a most unlikely hypothesis. But it is enough to say that, apparently, no trace of such an arrangement can be found in any of the deeds of either party, and that nothing is known of the circumstances which existed when the premises, which now belong to the appellant, and the premises which now belong to the respondents, if they ever formed one property, became separated. There is certainly no need to resort to the presumption of a lost grant when the facts of the case, so far as they are known, suggest a much simpler and a more natural explanation.

I think the fallacy in the judgments of the learned judges who were in favour of the appellant comes from the manner in which they have looked at the facts of the case. I do not think that you can legitimately separate the use of the way from the payment made in respect of the way. The use of the way explains the payment. The payment explains and qualifies the use. But the learned judges appear to sever two things which seem to me to be inseparable. They first take the way. They say: "Here is a way which has been used for forty years without interruption. That gives an indefeasible right under the Prescription Act." Then they look at the payment and they ask, How is that to be explained? And various hypotheses are suggested which seem to me mere guess-work. Cozens-Hardy J. goes further. He would hold that an annual licence (for such he takes it to be) coupled with an annual payment, if the arrangement originated more than forty years ago and is continued for forty years, confers an indefeasible right, provided there is no break or change or new departure, but things are left to go on just as they did before. This view seems to give the go-by to the words "claiming right thereto" and "as of right," which are certainly not the least important words in the Prescription Act.

I do not think that the cases which were cited at some

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length, most of which are reviewed in the judgment of Cozens-Hardy J., throw any light upon this case, which must depend on its own circumstances; and I may add with all deference that I think the Prescription Act has very little to do with it. I rather doubt whether the scope and effect of the Prescription Act have been always rightly apprehended. The Act was passed, as its preamble declares, for the purpose of getting rid of the inconvenience and injustice arising from the meaning which the law of England attached to the expressions "time immemorial" and "time whereof the memory of man runneth not to the contrary." The law as it stood put an intolerable strain on the consciences of judges and jurymen. The Act was an Act "for shortening the time of prescription in certain cases." And really it did nothing more. A person who claims a right of way and invokes the protection of the Act must claim "as of right." But when the way in question has been used without interruption, as defined in the Act, for forty years "as of right"—whether the claimant is really entitled of right or not—the claim cannot be defeated except by shewing that the right claimed was enjoyed "by some consent or agreement expressly given or made for that purpose by deed or writing." No parol consent will do. I fail to understand how that provision helps the appellant. The respondents do not set up a parol consent given before the period of forty years. They rely on the acknowledgment and recognition of their dominion over the property—their right to grant or withhold the grant of the way in question—involved in and evidenced by the annual payment accompanying the use of the way, and they point out that no other reasonable explanation of that payment is forthcoming.

I am therefore of opinion that the appeal must be dismissed with costs.

LORD DAVEY. My Lords, I must confess that at the conclusion of the argument I was disposed to agree in the opinion of Cozens-Hardy J. and Rigby L.J.; but further reflection has satisfied me that I ought not to do so, and I will shortly state why. The bare facts of the case are that

for more than forty years, and it is said from the beginning of the last century, the appellant and her predecessors in title have enjoyed a way over the inn yard, now vested in the respondents, and for more than forty years have paid an annual sum of 15*s.* to the owners for the time being of the inn yard. Nothing is known as to the origin of the enjoyment of the way or of the annual payment, but both parties are agreed in connecting the latter in some way with the enjoyment of the way. The appellant says that it was a payment by way of composition for the expense of keeping the way in repair. There is a scintilla of evidence in favour of this allegation, but nothing which approaches proof of it. The respondents, on the other hand, say that it is paid as an annual acknowledgment for the permission to use the way.

The 2nd section of the Prescription Act, so far as material, is in the following words: "Where such way as herein last before mentioned" (i.e., a way to be enjoyed over the land of another) "shall have been so enjoyed as aforesaid" (i.e., by a person claiming right thereto without interruption) "for the full period of forty years, the right thereto shall be deemed absolute and indefeasible unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

From the language of this section it is plain that a person cannot claim to have his enjoyment of an easement protected against defeat otherwise than by an agreement in writing unless he can first prove that his enjoyment has been that of a person claiming as of right. What, then, is the effect of the annual payment of 15*s.*? Rigby L.J. thought that to treat it as an acknowledgment de anno in annum of the respondents' right to stop the way was an arbitrary assumption. Admitting that to be so, it is at least equally an arbitrary assumption to treat it (as Cozens-Hardy J. did) as evidence of a parol agreement antecedent to the period of forty years to grant a perpetual licence in consideration of the annual payment, or (which appears to me a more plausible hypothesis) as evidence of a prior grant of the right of way in consideration of an annual rent issuing out of the land to which the right of way is claimed

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as appurtenant. To put the case most favourably for the appellant, the payment is of an ambiguous character, and capable of either explanation. But one explanation is inconsistent with an enjoyment as of right, while the other is not so, and it is for the appellant to make out that she and her predecessors in title have enjoyed "as of right," and for that purpose to shew which is the true explanation of the annual payment, and this she has not done. To quote the well-known formula, an enjoyment as of right must be nec vi, nec clam, nec precario. The appellant shews that the enjoyment has not been either vi or clam, but she fails to prove that it has not been precario.

I therefore agree that the appeal should be dismissed. The alternative claim by a lost grant is really the same thing in another form.

LORD ROBERTSON. My Lords, as the House will have heard five reasoned judgments in this case, I shall not say more than that I entirely concur and have never had any doubt in the matter.

LORD LINDLEY. It is unnecessary for me to restate the facts. The question for your Lordships' decision is, Do the uncontested facts or do they not establish a right of way across the defendants' yard for horses and carts going to or from the yard of the plaintiff? Cozens-Hardy J. and Rigby L.J. thought they did, but Vaughan Williams and Romer L.JJ. thought differently, and, having carefully considered the evidence and the authorities, I have come to the conclusion that they are right.

The plaintiff's statement of claim is so drawn as to entitle her to succeed if she can bring herself within the Prescription Act, or failing that, if the facts warrant the presumption of a lost grant. Cozens-Hardy J. considered that she was entitled to succeed under the Prescription Act; but that if not, a lost grant in her favour ought to be presumed. It is necessary to consider both of these methods of establishing her right; for the Prescription Act has not taken away any of the modes of

claiming easements which existed before that Act was passed: see *Aynsley* v. *Glover*. (1)

I will take the Prescription Act first. Sect. 2 is the important section, and the last part of it is relied upon by the plaintiff. To bring herself within this enactment she must prove that she and her predecessors in title have enjoyed the way in question "claiming right thereto" without interruption for forty years. The difficulty is raised by the words "claiming right thereto," and by the payment of the 15*s*. a year. I understand the words "claiming right thereto" and the equivalent words "as of right," which occur in s. 5, to have the same meaning as the older expression nec vi, nec clam, nec precario. A temporary permission, although often renewed, would prevent an enjoyment from being "as of right"; but a permanent, irrevocable permission attributable to a lost grant would not have the same effect. The common law doctrine is that all prescription presupposes a grant. But if the grant is proved and its terms are known, prescription has no place.

A title by prescription can be established by long peaceable open enjoyment only; but in order that it may be so established the enjoyment must be inconsistent with any other reasonable inference than that it has been as of right in the sense above explained. This, I think, is the proper inference to be drawn from the authorities discussed in the Court below. If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established; and this, I think, is the real truth in the present case.

The enjoyment is equally open to explanation in one of two ways, namely, by a lost grant of a right of way in consideration of a rent-charge on the plaintiff's land of 15*s*. a year, or by a succession of yearly licences not, perhaps, expressed every year, but implied and assumed and paid for.

I do not think that the evidence about repairing the pump and repairing the yard justifies the conclusion that there was a right of way, and that the 15*s*. a year was paid, not for it, but for repairs.

This conclusion also prevents the application to the present

(1) (1875) L. R. 10 Ch. 283.

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case of the doctrine of a lost grant. For that doctrine only applies where the enjoyment cannot be otherwise reasonably accounted for.

For the reasons above stated, and after much consideration, I have come to the conclusion that the decision of the Court of Appeal is correct, and ought to be affirmed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 11, 1903.

Solicitors: *J. H. H. Kidgell; Lovell & White.*

[HOUSE OF LORDS.]

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CAPITAL AND COUNTIES BANK, LIMITED . . . . . } APPELLANTS;

AND

GORDON . . . . . RESPONDENT.

LONDON CITY AND MIDLAND BANK, LIMITED . . . . . } APPELLANTS;

AND

GORDON . . . . . RESPONDENT.

Banker—Cheque—Conversion—Crossed Cheque paid into Customer's Account—Forged Indorsement—Credit given to Customer before Cheque cleared—Draft by one Branch of Bank on another—Bills of Exchange Act, 1882 (*c.* 61), *s.* 82—*Revenue Act*, 1883 (*c.* 55), *s.* 17—*Stamp Act*, 1853 (*c.* 59), *s.* 19.

Bankers are protected by s. 82 of the Bills of Exchange Act, 1882, only where they receive payment of a crossed cheque as agents for collection for a customer. They are not so protected when they receive payment as holders of the cheque on their own account.

The appellant banks credited a customer with the amounts of cheques as soon as they were handed in to his account and allowed him to draw against the amounts so credited before the cheques were cleared:—

Held, that they were not protected by s. 82.

The protection given by s. 82 applies only to cheques crossed before they are received by the banker.

The decision of the Court of Appeal, [1902] 1 K. B. 242, affirmed on the above points.

A banker's draft payable to order on demand addressed by one branch of a bank to another branch of the same bank and not crossed is not a cheque within the meaning of ss. 60, 82 of the Bills of Exchange Act, 1882, nor is it within s. 17 of the Revenue Act, 1883. But it is within s. 19 of the Stamp Act, 1853, which protects bankers bonâ fide paying such drafts to holders claiming under forged indorsements.

The decision of the Court of Appeal varied to the above effect on this point.

THE facts material to the first appeal are taken in substance from Lord Lindley's judgment.

Gordon, who traded as Gordon & Munro, was the holder for value of crossed cheques, drawn by various persons on various banks and payable to Gordon & Munro or order. Gordon had a clerk named Jones who forged indorsements in the name of Gordon & Munro on these cheques, and then took or sent them to the Capital and Counties Bank, where he had an account. Jones also indorsed them in his own name, and the bank credited his account with the amounts, and he drew on his account whilst the amounts of the cheques so paid in stood to his credit. The bank manager dealt in this matter with perfect bona fides and without negligence, having no suspicion that anything was wrong. He said he held the cheques until he received payment for Jones and credited his account with the proceeds, and that he received the cheques in the ordinary course of banking business, and that all the cheques were collected for Jones. The bank manager was not cross-examined on these answers; but there is some ambiguity about them. The documents and accounts, however, shew exactly what was done, and it is plain that the bank did not wait until the cheques paid in by Jones had been passed through the clearing-house before their amounts were placed to his credit. They were placed to his credit when he paid the cheques in; and he was allowed to draw upon his account increased by them as above stated. None of the cheques were ever returned to the bank; they were all duly honoured, and the appellant bank received their amounts in due course from the banks on which they were respectively drawn. Afterwards Jones' frauds were

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discovered, and he was prosecuted and convicted. Gordon, who had been robbed of the cheques and wrongfully deprived of the money represented by them, brought an action against the bank to recover that money which the bank had received under the circumstances above described.

The second appeal arose out of a similar action by Gordon against the London City and Midland Bank in respect of different classes of cheques, which are described in Lord Lindley's judgment and at p. 244 of the report below, [1902] 1 K. B. 242. Of these classes 1, 3, 6, and 8 were alone in question on this appeal.

The two actions were tried by Bucknill J. with a jury. The jury found in each case that the banks had not been guilty of negligence in taking the cheques. All other questions were left to the learned judge, it being admitted that the banks had acted in good faith. Bucknill J. entered judgment for the defendants on the main question in both appeals, and for the plaintiff as to class 1 in the second appeal.

The Court of Appeal (Collins M.R., Stirling and Mathew L.JJ.) entered judgment for the plaintiff in the first appeal for the amount claimed; and in the second appeal for the plaintiff as to classes 3, 6, and 8. Against these decisions so far as they were adverse to them the banks respectively brought the two present appeals.

1902. Dec. 4, 5, 8, 9. *Cohen, K.C.* (*Spencer Bower* with him), for the Capital and Counties Bank, and *Haldane, K.C.* (*Hugo Young, K.C., P. G. Henriques*, and *H. C. Holden* with him), for the London City and Midland Bank, contended on the main question, the question of fact, that the banks did in fact receive payment of the cheques as agents for their customer Jones: and that the transaction was not in fact a purchase of the cheques. The reasons for and against this contention are stated in the judgments in this House and are very fully discussed in the report below. With regard to the drafts in class 3 the counsel for the London City and Midland Bank contended that the bank was protected by s. 19 of the Stamp Act, 1853.

A. T. Lawrence, K.C., and *John Leslie*, for the respondent in both appeals.

Cohen, K.C., in reply, for the appellants in the first appeal.

Haldane, K.C., in reply, for the appellants in the second appeal.

1903. May 11. LORD MACNAGHTEN. My Lords, I am sure I need not trouble the House by recounting in detail the facts of these cases or describing the classes into which, for the sake of convenience, the drafts forming the subject of this litigation have been divided. It will be enough, I think, to remind your Lordships that all the drafts now in question were stolen from the respondent, Gordon, trading in Birmingham under the style of Gordon & Munro, by a man called Jones, who was Gordon's ledger clerk for about ten years. Jones himself lived in Sparkbrook. Unknown to his employer he carried on a small business of his own as a coffin furniture maker in Birmingham. In the name of the firm under which he traded he kept an account with the Birmingham branch of the Capital and Counties Bank, and also with the Sparkbrook branch of the London City and Midland Bank. To one or other of these accounts Jones paid all the drafts which he stole from Gordon, forging the necessary indorsement when the draft was payable to order on demand, as was generally the case. When the fraud was discovered and Jones had been prosecuted and convicted, Gordon brought an action against each of the two banks for conversion of such of the stolen drafts as could be traced to its hands, with a count in the alternative for money had and received to his use.

The actions came on to be tried before Bucknill J. and a special jury. The only question left to the jury was the question of negligence. The result of the findings of the jury on this point was in favour of the banks. All other questions were reserved for the judge. On the principal matter in controversy Bucknill J. gave judgment for the banks. This decision, however, was reversed by the Court of Appeal.

The main question raised in these two appeals, and the most important as regards amount, related to crossed cheques

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payable to order on demand drawn on banks other than the bank which was being sued. It is not disputed now that as regards these cheques there can be no defence unless protection is afforded by s. 82 of the Bills of Exchange Act, 1882, which declares that "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner by reason only of having received such payment."

Now it is admitted that each of the two banks acted in good faith. The suggestion of negligence on their part has been negatived by the findings of the jury. It cannot be denied that Jones was a customer within the meaning of the section. The only question, therefore, is, Did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which, perhaps, might otherwise attach to some preliminary action on their part taken in view and anticipation of receiving payment. The section would be nugatory—it would be worse than nugatory—it would be a mere trap if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business and intended to lead up to that result.

The character in which a bank receives payment of a cheque is, as has been already said in this House, a question of fact. (1) To my mind it would have been more satisfactory if the jury under proper directions from the judge had answered this question themselves. It was, however, withdrawn from their consideration.

The appeal was argued very fully and very ably by the learned counsel for the appellants, and especially by Mr. Cohen. And I must say that I was a good deal impressed by his argument in opening. At first sight there is not much difference between the case of a bank which at once credits a customer with the face value of a cheque paid in to his account and allows him to draw against his credit balance thus increased,

(1) *M'Lean* v. *Clydesdale Banking Co.*, (1883) 9 App. Cas. 95, 115.

and the case of a bank which without crediting the customer with the value of a cheque before collection allows him to overdraw his account in view of the anticipated credit. In each case it was said the credit is only provisional, whether entered in the customer's account or not. In each case it was said payment when received is received for the customer. And in a sense that is true. Then it was urged with some force that practically the only result of upholding the decision under appeal will be to compel some bankers to keep a double set of books where now only one set is required, and thus to impose upon bankers a good deal of extra and perhaps unnecessary trouble. But the protection conferred by s. 82 is conferred only on a banker who receives payment for a customer—that is, who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents they are not within the protection of the section. It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account the banker becomes holder for value of the cheque. It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value.

So long as a bank has for its customers only persons of position with whose circumstances the manager is fully acquainted, as is not unfrequently the case in country districts, where one bank by arrangement with its competitors has a monopoly, it matters little whether the bank at once credits a customer with the face value of cheques paid into his account or waits until collection. The bank only looks to its own customers. But Parliament may have thought that in the increase of banking business likely to arise in consequence of the legislation with respect to crossed cheques, and the competition sure to follow, it would not be improbable that small accounts might be opened with banks by persons of little or no credit, and that it might be a dangerous thing to extend protection to bankers dealing with crossed cheques in all cases, whether they acted simply as agents for collection or in a

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different character. Or possibly at the time bankers asked for no further protection than that which s. 82 purports to confer. However that may be, your Lordships have only to construe the language of s. 82 in connection with the language of the other sections of the Act bearing on the point.

It seems to me, my Lords, that the decision of the Court of Appeal on this question, which is the main question involved, is perfectly right. In the judgments of the learned judges of the Court of Appeal, and especially in the judgment of Collins M.R., I find the subject dealt with so completely both as regards the history of the legislation and the principles and decisions applicable to the case that, speaking for myself, I think it would be a waste of time to do more than say that I accept their view. It appears to me that the Master of the Rolls has accurately summed up the whole case. "The protection afforded by s. 82 must," he says (1), "be limited to that which is necessary for the performance of the duty which by the legislation as to crossed cheques was imposed on bankers. If bankers deal with crossed cheques in the ordinary way in which bankers dealt with cheques before the legislation as to crossed cheques and in which they deal with cheques other than crossed cheques at the present time, namely, by treating them as cash, and upon receipt of them at once crediting the customer with the amount of them in the ordinary way instead of making themselves a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer, I think they are collecting the money, not merely for their customer, but chiefly for themselves, and therefore are not protected by s. 82."

On all the other questions that have been raised I agree with the Court of Appeal except as regards the small drafts of which class 3 is composed. On this point I agree with my noble and learned friend Lord Lindley, whose opinion I have had the advantage of reading. It is a very small point and ought not, I think, to make any difference as regards the cost of the appeal.

Subject therefore to a slight variation as regards these drafts,

(1) [1902] 1 K. B. 242, at p. 265.

amounting in all to 32*l.* 15*s.* 9*d.*, I move your Lordships that the decrees be affirmed and the appeals dismissed with costs.

LORD SHAND. My Lords, I have read and agree with the judgments of my noble and learned friends, Lord Macnaghten and Lord Lindley.

LORD DAVEY. My Lords, I had prepared notes for a judgment of my own in this case when I had an opportunity of reading the very full judgment which is about to be delivered by my noble and learned friend Lord Lindley. I agree so entirely with the views which he has expressed, and in particular with regard to the Stamp Act, that I have not thought it necessary to prepare a judgment of my own.

LORD ROBERTSON. My Lords, I also have had the pleasure of reading the opinion of my noble and learned friend opposite (Lord Lindley), and I agree with all parts of it.

LORD LINDLEY. My Lords, the question raised by the first appeal turns entirely on the true construction and effect of s. 82 of the Bills of Exchange Act, 1882.

If this case had to be determined on general principles of English law apart from statutory enactment, the bank would have had no defence to Gordon's action. Before the Judicature Acts he could have recovered the value of the cheques, either in an action of trover or in an action for money had and received. A long series of well-established authorities, which cannot, I apprehend, be now questioned, establishes the liability of the bank beyond all dispute; nor was this seriously contested by the counsel for the appellants.

But then reliance is placed on s. 82 of the Bills of Exchange Act, 1882. This section has come before the Courts more than once, and before this House in the *Great Western Ry. Co.* v. *London and County Bank.* (1) Those cases only go to shew that a bank is not protected by the section unless, first, the bank acts in good faith and without negligence; unless, secondly, it receives payment for a customer; and unless,

(1) [1901] A. C. 414.

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thirdly, the bank only receives such payment. The last paragraph of the section shews that this third condition is as important as the first and second. But the questions in any particular case, whether a bank has received payment for a customer in good faith and without negligence, and whether the bank has only received such payment, are questions of fact depending on the circumstances of each case.

The facts of this particular case do not, in my opinion, bring the bank within the operation of the section. What has to be considered is not the cheque, but its payment. Now, when the cheque was paid to the bank, the bank received the payment for itself rather than for Jones. It is no doubt true that if the cheque had been dishonoured, Jones would have become liable to reimburse the bank the amount advanced by it to him when it placed the amount to his credit. This he would have to do where any cheque, crossed or not, was placed to his credit and was afterwards dishonoured. To this extent and in this sense it may be said that the bank received payment for Jones, because payment of the cheque discharged him from the liability he would have been under to repay the bank the sum placed to his credit if the cheque had not been paid. But what your Lordships have to consider is not Jones' liability to the bank if the bank never received payment of the cheque, but for whom did the bank in fact receive such payment. The amount would not be again placed to Jones' credit: it was already there. The bank in its then ignorance of the forgery could not withdraw that credit after it had received payment of the cheque. As between the bank and Jones the money paid belonged to the bank as soon as the bank received it. The bank had a right to sue for the money, and to apply it in any way the bank thought proper, provided only Jones was not treated as owing its amount.

It was said by the appellants' counsel, with some confidence, that any jury of business men would find, as a fact, that the bank received payment of these cheques for Jones, and nothing more. All I can say is that I think it very likely they would do so if left to themselves without proper directions from the judge, but that if proper directions were given them they

would not be likely to go wrong. It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right. Nothing occurred in this case to the knowledge of the bank which had any such effect. It appears to me impossible to say that under these circumstances the bank received payment of the cheques in question for their customer Jones.

Whether it is desirable to alter the wording of s. 82 is not for your Lordships to consider on the present appeal; but so long as that section stands in its present form bankers who desire its protection will have to be more cautious, and not place crossed cheques paid in for collection to the credit of their customers before such cheques are paid.

This appeal should, in my opinion, be dismissed with costs.

I pass now to the appeal of the London City and Midland Bank, Limited. This appeal raises not only the same question as the last, but also several further questions owing to the forms of the cheques and drafts paid by Jones into the appellant bank. Of the eight classes of instruments sued upon, only Nos. 1, 3, 6, and 8 have to be considered by your Lordships.

Class 6 is like those which had to be considered in the appeal of the Capital and Counties Bank. It is unnecessary for me to say more about these, for the reasons already given are applicable to them. It may, however, be useful to mention that Jones was required by the London City and Midland Bank to indorse the cheques which he paid in to it, and that he frequently availed himself of the credit given him for those cheques by drawing against such credit. The accounts shew that this was constantly done, and to a much greater extent than in the case of the Capital and Counties Bank. These additional circumstances cannot in any point of view improve the position of the appellant bank. The decision of the Court of Appeal on this class was, in my opinion, correct.

Class 1 consists of cheques not crossed when taken by the appellant bank. My Lords, it appears to me that s. 82 would be deprived of all meaning if it were held to apply to cheques

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not crossed when they came to the hands of the bank seeking the protection of that section. Sect. 77, clause 6, does not assist the appellant bank in the present case, although it might be useful if an indorsement were forged after a crossing. As regards this class, I can usefully add nothing to what was said in the Courts below.

Class 3 presents more difficulty: it consists of four small drafts drawn by a country branch of the appellant bank on its own head office and not crossed. The first question which has to be considered is whether these instruments are bills of exchange as defined in s. 3 of the Bills of Exchange Act. If they are, then, not being crossed, s. 82 will have no application to them, even if that section could have applied in this case to such documents if crossed. But if these drafts are bills of exchange within the meaning of s. 3, they will come within s. 60, and the bank will be protected by it, for these cheques are drawn on the bank sought to be made liable for paying them. But I agree with the Court of Appeal in thinking that the bank, which is both drawer and drawee of these instruments, is not entitled to treat them as bills of exchange as defined in s. 3 of the Bills of Exchange Act, although a holder may sue the bank upon them, and treat them either as bills of exchange or as promissory notes: see s. 5, sub-s. 2. An instrument on which no action can be brought by the drawer can hardly be a bill of exchange within s. 3 of the Act, whatever it may be called in ordinary talk.

Next it was contended that s. 17 of the Revenue Act of 1883 (46 & 47 Vict. c. 55) extended to these documents, and brought them within the protecting clauses of the Bills of Exchange Act. But, as pointed out by the Court of Appeal, s. 17 of the Revenue Act, 1883, only applies to drafts issued by a customer of a bank, whilst these drafts were issued, not by a customer, but by a bank to a customer. I agree, therefore, with the Court of Appeal on this point.

But then reliance was placed on the Stamp Act of 1853 (16 & 17 Vict. c. 59, s. 19), which relates to drafts or orders drawn on bankers and payable to order on demand. The section exonerates the bankers drawn upon from liability if

they pay such drafts or orders to holders claiming under indorsements which are forged. This statute was passed before crossed cheques were regulated by statute, and it has no special reference to them; nor does it refer to any bankers except those on whom the instruments are drawn.

The history of this section is well known. It was inserted at the instance of Lord Overstone, when cheques to order on demand bearing one penny stamps were first introduced. He saw that these would become common, and would expose bankers to serious risks from forged indorsements, and the section was inserted for their protection. The Stamp Act of 1853, except s. 19, has been repealed; but s. 19 has been preserved, and in 1872 it was made applicable to documents issued by the Paymaster-General in pursuance of the Court of Chancery Funds Act (35 & 36 Vict. c. 44, s. 11). This section, although referred to in the amended points of defence, was apparently overlooked in the Court below; at all events, it is not noticed in the judgments delivered by the Court of Appeal. I can, however, find no reason for saying that it does not apply to class 3. In terms it clearly does. Bigham J. had this point before him in *Brown & Co.* v. *National Bank of India* (1), and he decided that in that case the bank was not protected. He did so on the authority of the decision of the Court of Appeal in the case now before your Lordships; but it is manifest that had it not been for this authority the learned judge would have decided the other way. The draft he had to deal with was drawn in Madras on London, and in Grant on Banking, p. 24, it is said that s. 19 only applies to inland bills. It is unnecessary to consider whether this is right, as the drafts now under consideration are inland drafts.

I invite your Lordships' attention to the fact that s. 19 of the Act of 1853 is left unrepealed by the Bills of Exchange Act, 1882, although s. 60 of that Act is evidently taken from s. 19 of the Act of 1853, and made applicable to bills of exchange, and to cheques, as defined in ss. 3 and 73 in the Bills of Exchange Act of 1882. The only conclusion which I can draw from these enactments is that s. 19 of the Act of 1853 was purposely left unrepealed in order that it might apply to

(1) (1902) 18 Times L. R. 669.

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drafts or orders which did not fall within the definitions of bills of exchange or cheques in the codifying Act of 1882. These definitions are far more limited and scientific than the sweeping descriptions contained in the Stamp Acts; and s. 19 of the Act of 1853 appears to me to be purposely preserved in order to protect bankers cashing drafts or orders on them, and which are not bills of exchange or cheques as defined in the Act of 1882, in the same way as s. 60 of that Act protects them from cashing documents drawn on them, and which are bills of exchange and cheques as defined in it.

As regards these four drafts, therefore, I think there has been an oversight, and that the decision appealed from is wrong.

There remains only class 8, i.e., instruments drawn in favour of Gordon & Munro, and crossed payable only upon signature by the payees of a form of receipt at the foot of the instrument, and not drawn upon the appellants. These documents are clearly not bills of exchange within the meaning of the Bills of Exchange Act. Nor, for reasons already given, are they brought within it by s. 17 of the Revenue Act, 1883. Nor do they come within s. 19 of the Stamp Act of 1853, which, as I have already observed, applies only to banks which are drawees.

In substance this appeal fails, although as to a few drafts of comparatively small amounts it succeeds. The result in my opinion, therefore, is that the decision of the Court of Appeal should be affirmed except so far as it relates to the drafts forming class 3, but that as to them the decision should be reversed. This success is, however, too small to affect the costs of the appeal, which should be borne by the appellants.

In the first appeal, order of the Court of Appeal affirmed.

In the second appeal, order of the Court of Appeal reversed as to the drafts in class 3: in other respects affirmed.

Both appeals dismissed with costs.

Lords' Journals, May 11, 1903.

Solicitors: *Cameron, Kemm & Co.; Keen, Rogers & Co.; Pepper, Tangye & Co., for Pepper, Tangye & Winterton, Birmingham.*

[HOUSE OF LORDS.]

JAMES BRADLEY AND WILLIAM M. BRADLEY . . . . . } APPELLANTS;

AND

CARRITT . . . . . RESPONDENT.

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Mortgage—"Once a Mortgage always a Mortgage"—Equity of Redemption—Clog on Redemption—Mortgage of Shares in Company—Stipulation that Mortgagee shall be employed as Broker by the Company.

A holder of shares in a tea company mortgaged the shares to secure a loan and agreed to use his best endeavours to secure that "always thereafter" the mortgagee should have the sale of all the company's teas as broker, and in the event of any of the company's teas being sold otherwise than through the mortgagee to pay him the amount of the commission he would have earned if the teas had been sold through him. The mortgage was paid off and the company afterwards changed their broker. The quondam mortgagee having brought an action against the shareholder for breach of the above agreement:—

Held, by Lords Macnaghten, Davey, and Robertson, Lords Shand and Lindley dissenting, that the case fell within the principle of *Browne* v. *Ryan*, [1901] 2 I. R. 653, approved by this House in *Noakes* v. *Rice*, [1902] A. C. 24, that the agreement was not binding, and that the action could not be maintained.

The decision of the Court of Appeal, [1901] 2 K. B. 550, reversed.

WILLIAM M. BRADLEY holding most of the shares in a tea company by a written agreement of May, 1892, agreed in consideration of a loan from the respondent to transfer his shares to the respondent as security; and by the fourth clause he made the agreement stated in the head-note. The terms of the agreement are set out verbatim in the report below (1), and are closely analyzed in the judgment of Lord Lindley. James Bradley, brother to William, signed an agreement containing a similar clause. The loan was made to William; the mortgage was eventually paid off and the company afterwards changed its broker. The respondent brought an action against William and James Bradley jointly for breach of their respective agreements. The action was tried by Bigham J. with a jury, who found a verdict for the plaintiff for 750*l.* damages, and

(1) [1901] 2 K. B. 554-5.

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judgment was entered accordingly. The Court of Appeal (A. L. Smith M.R., Vaughan Williams and Stirling L.JJ.) affirmed this judgment. (1)

Feb. 24, 26. *Montague Lush, K.C.*, and *Buckmaster, K.C.*, for the appellants. The agreement contained in the fourth clause ceased to be operative when the mortgage was redeemed. The words "always hereafter" may mean "at any time hereafter," i.e., during the continuance of the loan. The fourth clause is part of the security, and if it did not cease to be operative was a clog on the equity of redemption. It is then invalid and identical in principle with *Browne* v. *Ryan* (2), approved by this House in *Noakes* v. *Rice* (3): see also *Salt* v. *Marquess of Northampton*. (4) *Santley* v. *Wilde* (5) was wrongly decided.

J. A. Hamilton, K.C., and *Dawson Miller*, for the respondent. The fourth clause was entirely collateral to the mortgage and in no way fettered the equity of redemption. It did not affect the shares after redemption; there was no legal or equitable restriction upon dealing with them: the mortgagor got back his property in the same condition as before the mortgage. This is the true test: *Mainland* v. *Upjohn* (6); *Biggs* v. *Hoddinott*. (7)

Buckmaster, K.C., in reply.

The House took time for consideration.

May 11. LORD MACNAGHTEN. My Lords, this appeal raises in a slightly different form and with some difference of circumstance the question which this House had to consider in the recent case of *Noakes* v. *Rice*. (3) Your Lordships, I think, have nothing to do now but to determine whether the distinction between the present case and the case of *Noakes* v. *Rice* (3), as finally decided, is or is not a solid and substantial difference leading to a different result. Other points, no doubt, were discussed at the bar, but the only effect of the discussion

(1) [1901] 2 K. B. 550.
(2) [1901] 2 I. R. 653.
(3) [1902] A. C. 24.
(4) [1892] A. C. 1.
(5) [1899] 2 Ch. 474.
(6) (1889) 41 Ch. D. 126.
(7) [1898] 2 Ch. 307.

was to incumber and embarrass the argument on the one point which was really arguable. In my view, all these other points were and are immaterial, and I pass them by altogether.

The distinction between *Noakes* v. *Rice* (1) and the case under review is brought out very clearly in the judgment of the Court of Appeal, which was delivered by Stirling L.J. It is, I need not say, a most careful judgment, to which little or nothing could be added by the learned counsel for the respondent. But if I am not mistaken, it shews some trace of the difficulties created by recent decisions and dicta in the Court of Appeal. And certainly it is only fair to bear in mind that at the time when it was delivered the case of *Noakes* v. *Rice* (1) had not gone beyond the Court of Appeal, while the principles re-established or definitely asserted by this House in *Noakes* v. *Rice* (1) had been shaken and obscured by the decision of the Court of Appeal in *Santley* v. *Wilde*. (2) I am aware that my noble and learned friend Lord Lindley, from whom I should never differ without the greatest hesitation and misgiving, still holds that *Santley* v. *Wilde* (2) was rightly decided. My noble and learned friend will, I am sure, pardon me for saying that I am unable to concur in that view. I think the method of the judgment questionable, and the effect subversive of a settled doctrine of equity. *Santley* v. *Wilde* (2) was the case of a mortgage to secure an advance of money. The loan was the occasion of the mortgage. The end and purpose of the mortgage was to secure the loan; and but for one stipulation in the mortgage deed the transaction would have been a matter of every-day occurrence. The mortgagee stipulated, of course, for repayment of principal, and for payment of interest properly so called; and by way of further remuneration for the accommodation afforded he stipulated for a share of the profits to be derived from the use of the mortgaged property, which happened to be a theatre held under lease for a term of years. Now that the usury laws have been repealed there cannot, I think, be any objection to such a stipulation, provided it comes to an end when the mortgagee is paid principal, interest, and costs. But in *Santley* v. *Wilde* (2)

(1) [1902] A. C. 24. (2) [1899] 2 Ch. 474.

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the stipulation was that the mortgagee should receive his share of profits after the mortgage was paid off, during the continuance of the mortgagor's interest in the property, for the whole term of the lease. That stipulation was, as it seems to me, unquestionably part of the mortgage transaction. Well, the mortgagee calls in the loan. The mortgagor tenders principal, interest, share of profits up to date, and costs, and demands a reassignment. This demand is refused; and then he brings an action for redemption. Reversing Byrne J., the Court of Appeal held that the mortgagor was not entitled to redeem. The way by which the Court arrived at that conclusion was this: "A mortgage," said the Master of the Rolls, "is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given." I cannot help thinking that the double aspect which this definition apparently presents may have had something to do with the result. For the Court of Appeal proceeded to split up the mortgage transaction into two parts—a security for payment of the debt, and a security for the discharge of an additional obligation. They say in effect: "The mortgagor may pay off the debt if he likes, but that will not discharge the mortgage. The mortgage will remain as a security for the performance of the obligation relating to the share of profits. As long as that obligation lasts the mortgage stands." The result, therefore, was, to use the words of Cozens-Hardy J., that "the proviso for redemption was nugatory," because it only came into operation when there was "nothing on which it could operate." That seems to me to be a very far-reaching decision. It reduces the rule that a mortgage cannot be made irredeemable to a dead letter. You have only to tack on some stipulation, such as men of business might well agree to if there were no mortgage, and the thing is done. In *Noakes* v. *Rice* (1) the mortgagee suffered, it would seem, merely because his legal advisers had the misfortune to know a little law, and had not learned the secret of *Santley* v. *Wilde*. (2) They thought they could make the covenant on which they meant

(1) [1902] A. C. 24. (2) [1899] 2 Ch. 474.

to rely run with the land. If they had not puzzled over a matter which is often one of some difficulty, if they had only inserted a covenant to the effect that the mortgagor and his assigns should get their beer from the mortgagee, and from no one else, so long as the lease lasted, and if the proviso for redemption had been so expressed as to cover that obligation, the mortgage, according to *Santley* v. *Wilde* (1), would have been irredeemable, and the covenant open to no objection.

Now, what was the Court of Appeal to do when it was confronted by the decision in *Santley* v. *Wilde* (1), and at the same time warned by what was said in *Biggs* v. *Hoddinott* (2) that judges were not to go one step beyond what had been actually decided? I must say I think the Court took the only course open to it.

In the first place, it is observed in the judgment of the Court of Appeal that it has never been laid down that it is essential for the validity of what are called, not very happily, I think, collateral stipulations, that they should cease to operate on redemption. That is perfectly true. But it may be said with equal truth that, putting aside the case of *Santley* v. *Wilde* (1), there is no case to be found in the books from the earliest times to the present day in which a mortgagee after redemption ever attempted to keep on foot the benefit of any collateral stipulation which was part and parcel of the mortgage transaction. And that surely is far more significant. You could hardly expect to find in any judicial utterance a note of warning against an experiment which before *Santley* v. *Wilde* (1) no one ever thought of trying. Then it is to be observed that it was the view of Cozens-Hardy J. and the Court of Appeal in *Noakes* v. *Rice* (3) that the covenant in question in that case imposed an actual burden on the land which was the subject of the mortgage. "The covenant," said Collins L.J., "imposes a tie upon the house, not a personal restriction upon the mortgagor." Giving great weight to this circumstance, and intending, no doubt, to keep strictly within the line of decided cases, the learned judges of

(1) [1899] 2 Ch. 474. (2) [1898] 2 Ch. 307.
(3) [1902] A. C. 24.

H. L. (E.) 1903 BRADLEY v. CARRITT. Lord Macnaghten.

the Court of Appeal came to the conclusion that a direct fetter on the equity of redemption, such as that which was supposed to exist in *Noakes* v. *Rice* (1), was not permissible, but that a fetter, or restriction operating indirectly, though it might have the same effect, was not open to objection, and, indeed, was sanctioned by principles said to have been laid down in *Biggs* v. *Hoddinott.* (2)

The real question is whether this distinction can be supported. It is necessary, I think, to examine closely the reasoning on which the conclusion of the learned judges of the Court of Appeal was based. At the outset they were met by a passage in a former judgment of Rigby L.J.: "'The property,' said Rigby L.J. in *Noakes* v. *Rice* (3), 'which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not, either expressly or by implication, reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force.'" That, my Lords, was very much what was said in this House when the case was before your Lordships; and it is quite right so far as it goes. To that expression of opinion exception was taken. The words "by implication" are explained away by saying, "It is an expression which we consider to have been used by Rigby L.J. with reference to a class of cases in which the obligation takes the form of a penal sum or liquidated damages by way of penalty on the doing of a particular thing." My Lords, I am not quite sure that I understand the force or application of that observation. Then the judgment goes on to observe: "It is said, however, that the shares, after redemption, are fettered, inasmuch as the stipulations into which the mortgagor had entered will prevent him from dealing so freely with his property as he otherwise would." And then follow these important words: "It is quite possible that an indirect effect of this nature may flow from these stipulations, but the same result would have followed if the stipulations had been entered into on the occasion of an advance being made by the plaintiff to the

(1) [1902] A. C. 24.
(2) [1898] 2 Ch. 307.
(3) [1900] 2 Ch. 445, at p. 457.

defendant W. M. Bradley on his personal security; and in that case the stipulation would, as it seems to us, be perfectly valid." My Lords, there again I have some difficulty in following the reasoning of the Court of Appeal. I should not have supposed that any one would contend that the peculiar doctrines of equity applicable to mortgage transactions apply in all cases, whether there is a mortgage or not, and I rather doubt whether the circumstance that a stipulation is valid when it is not part of a mortgage transaction is an argument for its validity when it is.

The judgment concludes by repeating what was said at the outset: "There is no decision that such indirect effect of the stipulations brings them within the doctrine of equity under consideration, and so to hold would," it adds, "reduce the operation of the decision in *Biggs* v. *Hoddinott* (1) within very narrow limits. For these reasons we think that the equity of redemption ought not in the present case to be held clogged."

My Lords, I have stated, in the words of their judgment, the reasons which induced the learned judges of the Court of Appeal to decide against the present appellants. I doubt whether those reasons can be regarded as altogether satisfactory. As to the last reason, I must say, speaking for myself, that I am not sure that it would be a great misfortune if the operation of every decision were to be confined to the matter decided and the principles on which the decision rests. Harm, I think, is sometimes done by general expressions, even in praise of a principle which everybody admires in the abstract, when they are not necessary for the purpose in hand. Though true in themselves, they are apt to be misunderstood owing to the connection in which they are found. One learned judge thought *Santley* v. *Wilde* (2) was covered by *Biggs* v. *Hoddinott* (1), though the actual decision in *Biggs* v. *Hoddinott* (1) does not, I think, touch the point raised in *Santley* v. *Wilde*. (2) *Biggs* v. *Hoddinott* (1) was a plain case. It purported to decide two things. In the first place, it purported to decide that a mortgage may be made irredeemable for a reasonable period. Well, everybody knows that when money was placed

(1) [1898] 2 Ch. 307. (2) [1899] 2 Ch. 474.

H. L. (E.) 1903 BRADLEY v. CARRITT. Lord Macnaghten.

out on mortgage as an investment nothing was more common than to make the mortgage irredeemable for a certain limited time. It was an old and well-established practice, and a very reasonable practice too. I do not understand that in the case of *Teevan* v. *Smith* (1) Sir George Jessel M.R. treated the point as open to any possible doubt. He referred to it, I think, as a practice well understood and perfectly valid. The other matter which *Biggs* v. *Hoddinott* (2) purported to decide was that a stipulation for additional remuneration during the continuance of the mortgage was valid. That, again, was a matter which was hardly open to question after the repeal of the usury laws. As my noble and learned friend Lord Davey pointed out in *Noakes* v. *Rice* (3), the additional remuneration is only interest in another form. Such a stipulation does not prevent the mortgagor getting back his property or impede or obstruct redemption.

My Lords, it seems to me to be playing with words to say that on redemption these shares came back to Mr. Bradley no worse than they were when he mortgaged them. If I part with property owing to a temporary necessity and the property is returned to me afterwards, do I get it back just as it was when it comes enveloped in an atmosphere of danger which was not present when I parted with it? Is it none the worse? Is its usefulness to me unimpaired if it now requires delicate handling and cautious treatment to prevent its becoming a source of mischief to its owner? Mr. Bradley could not have safely sold or mortgaged any of these shares when he got them back. True, their value to a purchaser or a mortgagee would be just the same. But what would have been Mr. Bradley's position? We were told, and it seems to stand to reason, that the only market for shares of this description is to be found among tea brokers. Tea brokers want to get hold of shares in a tea company in order to have the sale of the company's teas. That means or points to the displacement of the acting broker. A change of brokers in Mr. Bradley's company would, if the respondent be right, necessarily expose

(1) (1882) 20 Ch. D. 724, 729. (2) [1898] 2 Ch. 307.
(3) [1902] A. C. 24.

Mr. Bradley to a heavy liability. The Court of Appeal says that is not enough: the mortgagee has not retained any direct hold upon the shares, though he may have indirectly brought about the same result. My Lords, I do not think it is necessary that there should be any hold upon the property, direct or indirect. I think, as I ventured to say in *Noakes* v. *Rice* (1), that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. And I think your Lordships gave sanction to that proposition when you approved the decision in the Irish case of *Browne* v. *Ryan*. (2) Can you impose on the equity of redemption a fetter operating indirectly, when you cannot, as it is admitted, impose a fetter which operates directly? My Lords, I should have thought that that question answered itself—you cannot do indirectly that which you must not do directly.

The result, therefore, in my opinion, is that the judgment of the Court of Appeal cannot be maintained, and the action must fail so far as regards Mr. W. M. Bradley. It fails too, I think, as regards Mr. James Bradley. His liability, in my opinion, was only secondary to his brother's liability. When Mr. Carritt, by his own act in calling in the loan, put an end to the liability of Mr. W. M. Bradley, the liability of Mr. James Bradley fell with it.

For the reasons I have given I move your Lordships that the appeal be allowed and the action dismissed, and that the respondent do pay the costs both here and below.

LORD SHAND. My Lords, in this case I have had the advantage of reading and carefully considering the judgment of my noble and learned friend Lord Lindley, and I agree with him in thinking that the judgments of Bigham J. and of the Court of Appeal should be affirmed and the appeal dismissed. It is unnecessary for me to recapitulate the facts of the case, which have been fully stated by his Lordship, and, as I am in complete agreement with him in the grounds of judgment, I shall make only a few observations in addition.

In the case of James Bradley there is merely a reference

(1) [1902] A. C. 24. (2) [1901] 2 I. R. 653.

H. L. (E.) 1903 BRADLEY v. CARRITT. Lord Shand.

to the loan which the plaintiff, Mr. Carritt, had given to his brother, and in consideration of this he agrees, as a shareholder in the Sephinjuri Bheel Tea Company and in every other capacity, that Mr. Carritt, or any firm of brokers of which he shall for the time being be a partner, "shall always hereafter have the sale of all the company's teas as broker, and in case of any of the company's teas being sold otherwise than through you or your firm, I personally engage and agree to pay you the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm." This obligation is unconditional and simple. In respect of a loan given an obligation is granted, and not a word is added which can suggest the argument as to fettering or clogging the security afforded by the temporary transfer of shares in the case of his brother, William McKenzie Bradley, in the action against him.

Then as regards William. After an acknowledgment of money lent, an obligation for repayment with interest, a note, and a transfer of shares in the Sephinjuri Bheel Tea Company as security, subject, of course, to a right of redemption on the repayment of the loan and interest, the agreement proceeds: "4. I further agree as a shareholder of the Sephinjuri Bheel Tea Company, Limited, and in every other capacity, to use my best endeavours to secure that you, or any firm of brokers of which you for the time being shall be a partner (as you shall elect), shall always have the sale of all the company's teas as broker," with this addition: "And in the event of any of the company's teas being sold otherwise than through you or your firm, I personally engage and agree to pay to you or your firm the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm."

My Lords, I confess I think it was unfortunate for the law that the rule, now called a principle, "once a mortgage always a mortgage," with all its consequences, was ever carried further than was necessary for the purpose of relieving borrowers from forfeiture of their property on non-payment of the sum lent on a fixed day. I strongly agree with the expressions of opinion

of Lord Bramwell in the case of *Salt* v. *Marquess of Northampton* (1) in 1892, of Lord Lindley, Chitty L.J., and the present Master of the Rolls in the case of *Biggs* v. *Hoddinott* (2), that in agreements and obligations which cannot be represented to be unconscionable, or to have been procured by fraud or undue influence, and which are expressed in clear language quite understood by the parties who have entered into them, effect should be given to the terms used having regard to the true nature of their bargain. The origin of the rule is, however, to be traced, I believe, not to its natural and reasonable meaning in itself, but to the provisions of the usury laws which existed when it was introduced.

"Once a mortgage always a mortgage," however, had, and I think still has down to the present date, application only where the power of redemption by repayment of the loan is itself fettered or clogged by conditions which prevent full redemption even where such repayment is made or offered. And I agree with Lord Lindley in holding that this is not a case of that class, and that where, as here, redemption can be fully obtained by repayment of the loan and interest, a separate obligation for a different or collateral advantage to the lender is valid and enforceable.

It was argued that by art. 4 of the agreement Mr. William Bradley became bound to remain for all time a shareholder of the Sephinjuri Bheel Tea Company, and that this obligation was a fetter on his right to redeem his shares and to dispose of them, which by agreement affected the shares as his property even after the redemption of the loan. I am clearly of opinion there was no such obligation undertaken either expressly or by implication. If he continued to be a shareholder, no doubt he undertook to use his influence in that character to continue Mr. Carritt as broker, but he was quite free to sell his shares, as he was also free to redeem them on repayment of the loan. The true force of the agreement was contained in the entirely separate obligation that if the company's teas should be sold otherwise than through Mr. Carritt's firm he nevertheless personally bound himself to pay the

(1) [1892] A. C. 1. (2) [1898] 2 Ch. 307.

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broker's commission to Mr. Carritt or his firm. It may be assumed that if he had not agreed to grant that obligation he would not have obtained the loan.

By the agreement there was no restraint, fetter, or impediment on the power to redeem the mortgage. On payment of principal and interest Mr. William Bradley was entitled to have the mortgage entirely discharged or redeemed, and to recover the subject of the mortgage exactly as he had previously possessed it. The case is entirely distinguished from such a case as that of *Noakes* v. *Rice* (1) or similar cases, where, even after repayment of the principal and interest of the loan, the subject of the security still remained fettered by the condition that it was by the agreement to be a tied house. So, in all the cases which have occurred in which the rule "once a mortgage always a mortgage" has been enforced, the subject of the mortgage, notwithstanding the redemption by repayment of principal and interest, remained in some way fettered. Here the merely personal obligation to continue to pay commission on the withdrawal of the business of selling the teas in no way affects the subject of the security. The obligation was entirely separable and separate from anything relating to the subject of the security, which was Mr. Bradley's shares in the company, and there is no reason for holding that the obligation is in any way invalid. It appears to me, on my construction of the agreement, that if the appellants are to succeed in their present argument, the rule of law said to be founded on equity must henceforth be not merely "once a mortgage always a mortgage," but "once a mortgage and a separate personal agreement or obligation by the mortgagor, always a mortgage only, and no such binding agreement or obligation"; and that it may be contended hereafter that the rule in this form may be enforced even where the security and the subject of the security can be completely redeemed by the simple repayment of principal and interest. I confess I think such a proposition is unreasonable and unwarranted, first, because it operates so as to prevent the owner of a property from using its value to the full extent in obtaining a loan on it,

(1) [1902] A. C. 24.

and, secondly, because it enables him to disregard a clear obligation undertaken for onerous causes. If the right of redemption of the mortgage is quite unfettered, the authorities cited do not, I think, apply, and that is the case here.

In the case of *Noakes* v. *Rice* (1) I simply concurred in the judgment given. The Lord Chancellor had entirely expressed my view of the law, which I strongly hold, in his judgment to the effect that Lord Lindley had "given a most authoritative exposition of the true effect of the rule in the case of *Santley* v. *Wilde*." (2) Lord Lindley had there said, in words which the Lord Chancellor quoted and in which I entirely agree "Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this that once a mortgage always a mortgage, but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation, the payment or performance of which is to be secured, is a clog or fetter within the rule." The Lord Chancellor carefully added: "It is and must be in each case a question of the particular thing which is advanced as a clog or fetter, and in some cases it may seem to come very near the line. Whatever rule is laid down one can reduce it to something like an absurdity by taking an extreme case."

The only case to which I think it necessary to refer is that of *Browne* v. *Ryan* (3), one of that very class which, as the Lord Chancellor says, "may be said to come very near the line." In that case the mortgagee "sought damages for the breach of a contract depriving the mortgagor of his property even after its redemption by him," thus leaving a fetter on the subject of the security, as Lord Lindley observes in his judgment in this case; and so it may be taken simply as an illustration of the rule "once a mortgage always a mortgage," and is in this view clearly to be distinguished from the present case; for in this case there is no fetter of any kind on the power of redemption.

(1) [1902] A. C. 24. (2) [1899] 2 Ch. 474.
(3) [1901] 2 I. R. 653.

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LORD DAVEY. My Lords, in advising this House in the case of *Noakes* v. *Rice* (1) I endeavoured to express my views as to the meaning and effect of the equitable rules affecting the redemption of mortgage securities. I see no reason to dissent from anything which I then said, and I need not repeat it. I might, however, have added that the expression "clogging" or "fettering" the equity of redemption is not the happiest mode of expressing the object to which the third rule referred to by me is directed. The principle, as it appears to me, is that on payment of the principal, interest, and costs, together with any bonus or anything in the nature of a bonus which has been properly stipulated for, and has become payable, the mortgage contract comes to an end, and the mortgagor is entitled to get his property back, unaltered in character, condition, and incidents, and is henceforth relieved from the burden imposed upon him by the contract. If this be the true principle, as I think it is, the decision of the present case presents no difficulty. There can be no doubt that the obligation assumed by the first appellant in clause 4 of the agreement of May 16, 1892, is part of the mortgage contract, and the corresponding advantage to the respondent was derived therefrom exclusively. The form of the agreement shews this. It begins with the words "In consideration of two thousand two hundred and fifty pounds this day advanced by you to me." Then follow six numbered paragraphs containing the terms agreed to, including the fourth clause, which commences with the words "I further agree," and so forth. If, therefore, any breach of the agreement in the fourth clause had taken place during the currency of the mortgage, or any moneys had become exigible under it, I make no doubt that the appellant William McKenzie Bradley would have been liable. But the mortgage has now been paid off, and everything which became due during the currency of it has been paid. The breach which is complained of has taken place since redemption, and I am really at a loss to understand how, consistently with the equitable doctrine, a mortgagee can insist on retaining the benefit of a covenant in the mortgage

(1) [1902] A. C. 24.

contract materially affecting the enjoyment of the mortgaged property after all principal, interest, and costs, and everything which has become payable before redemption, has been paid.

My Lords, I agree with my noble and learned friend Lord Macnaghten in thinking that the case of *Santley* v. *Wilde* (1) was wrongly decided. I thought so when *Noakes* v. *Rice* (2) was under consideration by this House, and a further examination of the report of the case has confirmed me in my opinion. Two of the learned judges who decided that case in the Court of Appeal thought that it was covered by the case of *Biggs* v. *Hoddinott*. (3) I cannot agree. It is, to my mind, plainly distinguishable. All that I understand to have been decided in *Biggs* v. *Hoddinott* (3) is, first, that a stipulation for the continuance of a loan for five years was valid, and, secondly, that a covenant to take beer from the mortgagee limited to the continuance of the security did not clog the equity of redemption, and was enforceable by injunction. My noble and learned friend Lord Lindley, however, based his decision in *Santley* v. *Wilde* (1) on a broader ground, but he seems to me to have divided the transaction into two parts, namely, a loan of 2000*l.* and a sale of two-thirds of the profits of the theatre. That seems to me a fallacious and wrong way of looking at the transaction. There was only one transaction which was a mortgage transaction, and the only consideration for the grant of two-thirds of the profits was the loan of the money. It appears to me that the claim to retain the security as a security for the share of profits was in fact imposing a fetter on the redemption on payment of principal, interest, and costs. And I understand this to be the view taken by my noble and learned friend Lord Macnaghten.

It is, in my opinion, idle to say that the mortgagor in this case has got his property back unfettered or that he has the unrestricted enjoyment of it, if the agreements contained in the fourth clause of the contract of May 16, 1892, are held to constitute a continuing obligation. It is said that the performance of these agreements is not secured on the shares.

(1) [1899] 2 Ch. 474. (2) [1902] A. C. 24.
(3) [1898] 2 Ch. 307.

H. L. (E.) 1903 BRADLEY v. CARRITT. Lord Davey.

But, my Lords, that is not necessary. The agreements which were held objectionable, both in *Browne* v. *Ryan* (1) and in *Noakes* v. *Rice* (2), did not constitute charges on the mortgaged premises, but they fettered the mortgagor, in the one case, in the free disposition and, in the other, in the free enjoyment of his property. In the present case the agreement is that the appellant W. M. Bradley will, "as a shareholder," use his best endeavours to secure the sale of the company's teas to the respondent or his firm, and in the event of the teas being sold through another broker will pay to the respondent the amount of the commission which he or his firm might have earned. In other words, he agrees to use the voting power attached to his shares in a particular way for the respondent's benefit. Now, what is a share? It is but a bundle of rights, of which the right of voting at meetings of the company is not the least valuable. My Lords, can it be said that the mortgagee does not retain a hold upon the shares which form the mortgaged property, or that the mortgagor has full redemption of it, when the latter is not free to exercise an important right in such manner as he may think most conducive to his own interests? He may think it advantageous to the company to employ another broker, or that the change would produce a better return on his shares, but if he gives effect to his opinion he incurs what is in effect a heavy penalty. Again, the appellant could not part with or otherwise deal with his shares without losing the influence in the company's counsels which might enable him to secure the performance of the first part of the agreement, or running a serious risk of liability under the second part.

My Lords, I can see no difference in principle between this case and the case of *Browne* v. *Ryan* (1), which has already been approved in this House. The respondent can no more claim to be continuously employed as broker for the sale of the teas of the appellant's company, or to be compensated for loss of his commission if not so employed, than the land agent in *Browne* v. *Ryan* (1) could claim to be employed in the sale of the farmer's estate, or to be compensated for the loss of his

(1) [1901] 2 I. R. 653. (2) [1902] A. C. 24.

commission. I am, therefore, of opinion that, even if the fourth clause of the contract bears the construction which has been put upon it by the Courts below, the agreements contained in it are such as cannot, in the circumstances, be enforced by the Courts of this country.

But, my Lords, I doubt whether we ought to put that construction on the clause in question. Primâ facie a clause in a mortgage contract is limited to the duration of the mortgage relation between the contracting parties. In this clause we have the words "always hereafter"; but I observe that in two other clauses (the third and the fifth) a similar phrase, "at any time hereafter," is used and is limited by the context to the duration of the mortgage. I am disposed to say that the words "always hereafter," having regard to the nature and purport of the agreement, in like manner mean at any time hereafter during the currency of the loan. But in the view which I take of the case it is not necessary for me to express a decided opinion on this question.

With regard to the appellant, James Bradley's, agreement, I think it was part of the same transaction and ancillary to the principal agreement, and by way of further security to the respondent and increased remuneration to him for the use of his money. And I am of opinion that it must be construed in the same way, and stand or fall with the principal agreement.

I am, therefore, of opinion that the decision of the Court of Appeal should be reversed, and instead thereof the action should be dismissed with costs, and the respondent should pay the costs in the Court of Appeal and in this House.

LORD ROBERTSON. My Lords, in considering this case I have found myself greatly aided by first forming a clear conception of what is the respondent's theory of Mr. William Bradley's rights and duties as a shareholder of this company. Before this loan and agreement Mr. William Bradley was entitled, like every one else, to use his position as a shareholder solely for his own benefit. In particular, he could vote for such tea brokers as he thought would bring in good profits, and therefore good dividends on his 1541 shares. Now,

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according to the respondent, he is not entitled to do this. On the contrary, he is bound to vote in the important matter of choosing a tea broker, not in the interests of himself, the shareholder, but in the interests of the respondent, the candidate for the tea brokership. It is true he has the option (somewhat derisory, as I cannot but think) of voting freely and paying two tea brokers; for, if the respondent is not appointed, then Mr. William Bradley has got to make good to the respondent the commission lost by that gentleman's non-employment, as well as to contribute to pay the broker who is appointed. This, according to the respondent, is to be the tenure of his shares by Mr. William Bradley for all time, or at least so long as the respondent or his firm carry on business.

Now, if it be asked, Why is Mr. William Bradley thus limited in his enjoyment of his shares, and made bound to use them for the respondent's benefit? the answer must be, because, once upon a time, the respondent lent Mr. Bradley money, long since repaid, and gave him his shares in security, long since retransferred. This is not merely historically the fact, but the mortgage itself sets out that this limitation of Mr. Bradley's right to deal with those shares as his own is agreed to in consideration of the advance.

Accordingly, on this question of fact, it seems to me perfectly plain that, if the respondent is right in his law, one result of the agreement was that, in consideration of the advance, Mr. William Bradley had the respondent permanently quartered upon him, and that as regards that part of his estate, namely, the 1541 shares, Mr. Bradley was bound to use it, in one important relation, no longer for his own interest, but for the respondent's, and his own, only so far as his own did not conflict with the respondent's.

Now, when I turn to the law of the case, I speak with much more diffidence, for the system of jurisprudence in which I was trained does not in the matter of mortgages impose any restraint on free contracts. But I have made it my duty to study and understand the law now in question; I do not hold myself entitled to question or detract from it, and I am unable

to resist the conclusion that the appellants are entitled to prevail. I entirely agree in the judgment of Lord Davey.

LORD LINDLEY. My Lords, Mr. Carritt (the respondent in this case) brought an action against several persons, including the two appellants, for the recovery of damages for breaches by them of certain agreements entered into by them with him. The agreements sued upon were contained in three letters, namely, (1.) a letter dated August 14, 1889, signed by William Bradley on behalf of himself and all the other defendants; (2.) a letter dated May 16, 1892, signed by William Bradley alone; (3.) a letter of the same date signed by James Bradley alone. The plaintiff discontinued his action against the defendants other than the two Bradleys, and the action against them was tried before Bigham J. and a special jury. The plaintiff obtained a verdict and judgment for 750*l.* against the two Bradleys for their breaches of their agreements of May 16, 1892. From this verdict and judgment they appealed to the Court of Appeal, and asked that the verdict and judgment against them might be set aside, and that judgment might be entered for them with costs, or that a new trial might be directed. This appeal was dismissed with costs. The two Bradleys now appeal to your Lordships, and ask that judgment may be entered for them.

No question now arises as to the first agreement of 1889, and, except as part of the history of the two letters of May 16, 1892, the letter of 1889 is of no importance. The two Bradleys put in a joint amended defence, and alleged that if the letters of May 16, 1892, were to be construed as the plaintiff contended, then those letters did not express the real agreement between the parties, and ought to be rectified; and in the Court below evidence was gone into to establish this defence. The attempt to do so failed, and it was not seriously renewed either in the Court of Appeal or before your Lordships, and it is unnecessary to refer further to this controversy.

The questions raised by this appeal are:—

1. The true construction of the two letters of May 16, 1892.

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2. Their validity, having regard to equitable doctrines relating to mortgage transactions.

3. The form of the judgment as entered against the two appellants.

The two letters in question are set out in the record, and I will not detain your Lordships by reading them at length. The first of them, namely, that signed by William Bradley, is the most important, and the only one which need be considered in discussing the meaning and validity of both. In order to understand this letter the position of the writer and of Mr. Carritt, to whom it was written, should be known. The tea company mentioned in the letter had been formed in 1889 by the Bradleys, and Mr. Carritt had assisted them in the issue of debentures on the formation of the company. Mr. Carritt was a member of a firm of tea brokers, carrying on business under the name of Lloyd, Matheson & Carritt. In 1889 that firm had been appointed the tea brokers of the tea company, and the firm had been its tea brokers ever since. There had been some controversy, however, about the permanency of their appointment, and different views on this subject had been expressed. The two Bradleys were large shareholders in this tea company, and were also directors of it.

William Bradley wanted to borrow 2250*l.*, and Mr. Carritt lent it him on the terms mentioned in the letter. It is quite immaterial to consider the sources from which Mr. Carritt obtained the money. As between him and William Bradley, Mr. Carritt was the lender, and the advance of the money is not disputed.

The letter states that in consideration of the advance Bradley agrees to repay it with interest at 7 per cent., and as security he hands over (1.) his promissory note for that amount and interest; (2.) a transfer of 1541 fully paid-up shares in the tea company, and a certificate for those shares in Bradley's name. Then comes a power of sale in case of default of payment (clause 3), and this is followed lower down by a special power to sell forty-one of the shares even before any default is made (clause 5). So far there is nothing more than a loan, a promise to pay, a promissory note, and an

agreement for a mortgage of a certain number of shares with the powers of sale mentioned. There is another clause (6.) by which Bradley agrees to execute any further documents which Mr. Carritt shall require for perfecting or giving effect to the security intended to be thereby made.

In addition, however, to this mortgage transaction there is another clause (4.), which runs thus: "I further agree, as a shareholder in the Sephinjuri Bheel Tea Company, and in every other capacity, to use my best endeavours to secure that you or any firm of brokers of which you for the time being shall be a partner (as you shall elect) shall always hereafter have the sale of all the company's teas as broker. And in the event of any of the company's teas then being sold otherwise than through you or your firm, I personally engage and agree to pay to you or your firm the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm. This engagement on my part is in addition to and without prejudice to any previous engagements to you, and in particular to the contract of August 14, 1889, by which I agreed, on behalf of the proprietors, to give you the sale of all the company's teas."

The plaintiff's action, so far as Mr. William Bradley is concerned, is for a breach of this agreement. The loan was called in and was paid off, and the shares which had been transferred and registered in the name of Mr. Carritt, or his nominee, were duly retransferred to and registered in the name of William Bradley. But in August, 1899, the company changed their tea brokers and ceased to employ Mr. Carritt or his firm; and this action was then brought.

The first question which arises is the true construction of this clause 4. The defendants contend that when the loan was paid off this clause ceased to be operative; that it was part of the security for the loan, and that the words "always hereafter" ought to be construed as the words "at any time hereafter," in clauses 3 and 5 giving the powers of sale, must be construed. This contention appears to me quite untenable. It is obvious that the powers of sale are conferred in order to enable the mortgagee to get back his money, and for no other

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purpose, and the words "at any time hereafter" in those powers have no sensible meaning, and no legal operation after the loan is repaid. This reasoning is wholly inapplicable to clause 4.

Again, to say that clause 4 is part of the security appears to me quite incorrect. It is true that the loan of the money is the consideration for the whole agreement, including clause 4; but the security for the loan is the promise to repay it, the promissory note, and the shares with the powers to sell them. Clause 4 is in no sense part of the security for the money, but it is an additional advantage stipulated for by the mortgagee.

Clause 4 means what it says. It gives Mr. Carritt the option of himself, or any firm of tea brokers of which he is a member, becoming an applicant for the appointment of tea brokers to the company, and binds Mr. William Bradley to use his best endeavours to secure that appointment, and if any other broker should be employed by the company to sell the company's teas, then Bradley undertakes to pay to Carritt, or his firm as the case may be, the commission lost by their non-employment. The only limit to the duration of this agreement is that set by the possibility of carrying it out. It would necessarily cease if Mr. Carritt gave up the business of tea broker, or if the company gave up selling tea; but I can discover no other event on which it would come to an end. I can discover no legitimate ground for implying that it was to last only for a reasonable time, nor can I find any measure for such a period. To use Bigham J.'s language, the words "always hereafter" in this clause mean, "So long as I am in a position to sell the teas, and the teas are there for me to sell."

It is hardly necessary to add that Mr. James Bradley's letter bears the same meaning. This letter is to the same effect as clause 4; but Mr. James Bradley did not make himself liable for the loan, although the loan was the consideration for the promise he made.

I pass now to the second question, namely, the validity of the contracts sued upon, and it will be convenient to take Mr. James Bradley's letter first. If he had been sued separately for a breach of his contract, I cannot conceive what defence he

would have had to the action. Legal defence is out of the question, and, there being no fraud, undue influence, oppression, or extortion, I can discover no ground whatever for the interference of a Court of Equity with the legal rights of the plaintiff. Mr. James Bradley contracted as a principal; he was not a mortgagor; he was not a surety, or in any way responsible for the mortgage debt; he had no interest in the shares mortgaged; he would not be a necessary or proper party to any suit in equity by or against William Bradley for the redemption or foreclosure of his mortgage. I cannot see that Mr. James Bradley's position is altered by the fact that he has been made a co-defendant with Mr. William Bradley in the present action, or by the fact that the two defendants have joined in defending it. This procedure was, I suppose, adopted to save expense; but it cannot, in my judgment, affect the merits of the case in any way whatever. As regards Mr. James Bradley, I am unable to discover any defence or semblance of defence to the plaintiff's action.

Mr. William Bradley's position is no doubt different, for he was a mortgagor, and he is sued upon an agreement imposing upon him an obligation beyond that of repaying the money lent with interest and costs, and which agreement was entered into in consideration of the loan for which he mortgaged his shares.

My Lords, before considering the validity or invalidity of this additional agreement, it is essential to bear in mind that Mr. Bradley raised no defence to the action on the ground of fraud, undue influence, extortion, or oppression. No issue was raised or left to the jury on which a verdict could have been given for the defendant on any of these grounds. The only defence set up was a mistake, and this failed. The legal point that the agreement was invalid on equitable doctrines applicable to the admitted or established facts is of course still open for argument. But no other defence can, I apprehend, be now properly listened to. I allude more particularly to such a possible ground of defence as oppression or unfairness in the bargain. Bigham J. and the Court of Appeal both alluded to this suggested defence, and said that in their opinion

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the agreement was not oppressive or unreasonable, and I agree with them.

If the agreement contained in clause 4 is to be held invalid, it must be upon some equitable principle applicable to the terms of the bargain itself and to the facts not now in controversy. The equitable grounds relied on are, as I understand them, two in number, namely, (1.) that clause 4 is a clog on the redemption, and infringes the well-settled equitable principle, once a mortgage always a mortgage; (2.) that it is part of the mortgage transaction, and must, as a matter of law, cease with it, in conformity with the rule, once a mortgage always a mortgage, and nothing but a mortgage.

As to the first ground, clause 4 gives the mortgagee of the shares no right or interest in them legal or equitable. So long as he holds them as mortgagee he has the ordinary rights of a mortgagee, with the rights of selling them conferred by the other clauses of the agreement; but when he is paid off his principal, interests, and costs he is bound to retransfer the shares to the mortgagor, and clause 4 contains nothing whatever which entitles or purports to entitle the mortgagee to retain the shares, or to control the use of them when returned to the mortgagor. Clause 4 in no way fetters the right to redeem, nor obstructs the mortgagor in the practical exercise of that right, or of the use or enjoyment of his shares when he gets them back. He can then do what he likes with them, free from all control by the mortgagee. How it can be said that clause 4 clogs the equity of redemption or infringes the rule, once a mortgage always a mortgage, passes my comprehension. It is admitted that after redemption the mortgagor can sell the shares; but it is said that so long as he holds them he is bound to use whatever influence they give him in favour of the mortgagee, so as to enable him to retain his position of broker to the tea company. This observation, so far as it is true, applies to whatever shares Mr. William Bradley might happen to hold when it became necessary to use his influence in Mr. Carritt's favour. But clause 4 gives Mr. Carritt no legal or equitable right to have shares, still less any particular shares held by Mr. Bradley, used in any par-

ticular way. By the first part of clause 4 Mr. Bradley has bound himself to use his best endeavours to secure the tea brokerage for Mr. Carritt: this might or might not involve voting for him. The votes conferred by the shares might be too few to be of any use, and other endeavours than voting in respect of them might be more likely to prevail. But to say that the equitable principle under discussion is infringed, and that clause 4 is invalid simply because it might be necessary for Mr. Bradley to use the influence which the mortgaged shares, if retained, would confer in order to perform his engagement to Mr. Carritt, seems to me to stretch the doctrine under consideration to an extent not warranted by principle or authority.

The second part of clause 4 binds Mr. Bradley to pay commission if Mr. Carritt loses the tea brokerage to the company, even although Mr. Bradley may have used his best endeavours to prevent such loss. The second part of clause 4 increases the inducement to make such endeavours, but that is its only bearing on the present controversy; and it is plain from the summing-up of Bigham J. that the action was for a breach of this part of clause 4, and that the damages were assessed for this breach. The second part of the clause does not depend upon the first part, and comes into operation whether the first has been broken or whether it has been duly performed.

But then reliance is placed upon authority, and especially on *Salt* v. *Marquess of Northampton* (1), *Noakes* v. *Rice* (2), *Browne* v. *Ryan* (3), and the disapproval by some of your Lordships of *Santley* v. *Wilde*. (4) I will, therefore, shortly refer to these cases. *Salt* v. *Marquess of Northampton* (1) turned entirely on whether the policy then in question was mortgaged and for what. As soon as that was settled, there was no difficulty in applying the doctrine once a mortgage always a mortgage. That case does not appear to me to assist your Lordships to decide the present controversy one way or the other. In *Noakes* v. *Rice* (2), if the decision had been the other way and the contract had been upheld, the

(1) [1892] A. C. 1.
(2) [1902] A. C. 24.
(3) [1901] 2 I. R. 653.
(4) [1899] 2 Ch. 474.

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public-house, which was free when mortgaged, would have been tied to the mortgagee when redeemed. In *Browne* v. *Ryan* (1) the mortgagee, who was an auctioneer, had stipulated for the right to sell the mortgaged property within twelve months after redemption, and whether the mortgagor desired to sell or not. In *Noakes* v. *Rice* (2) this House approved that decision, although I expressed my doubts about its correctness. It goes further than any other case that I know of. I have searched in vain for any similar case in which the Court of Chancery restrained a common law action. But treating *Browne* v. *Ryan* (1) as having been properly decided, the difference between that case and this is apparent, for the mortgagee there sought damages for the breach of a contract depriving the mortgagor of his property, even after its redemption by him. In *Santley* v. *Wilde* (3) the Court of Appeal held that upon the true construction of the contract the property mortgaged, which was a theatre held for a short term of years, was made a security (1.) for money borrowed and interest, and (2.) for the performance of an agreement entitling the mortgagee to a share of profits earned by the mortgagor during the lease, even although the loan might have been repaid with interest.

The Court of Appeal, over which I then presided, considered that the security for both of these was valid. In *Noakes* v. *Rice* (2) two of your Lordships thought this decision wrong, and so did the Court of Appeal in Ireland in *Browne* v. *Ryan*. (1) The error in the decision in *Santley* v. *Wilde* (3), in the view of those who think it wrong, was that the property mortgaged was burdened with more than the loan made upon it, and that redemption was impossible. That is not so in the case now before your Lordships, as I have endeavoured to shew. *Santley* v. *Wilde* (3) was a difficult case, and it may have been wrongly decided, although I do not think it was. Be this as it may, I do not understand that the legal principles laid down in it have been condemned by this House as unsound. I say this after carefully considering the observations made on that case by the noble and learned Lords who decided *Noakes* v. *Rice*. (2)

(1) [1901] 2 I. R. 653. (2) [1902] A. C. 24.
(3) [1899] 2 Ch. 474.

It remains to consider the second ground, namely, that clause 4 is part of the mortgage transaction and must cease with it, or, in other words, that it infringes the last part of the rule, once a mortgage always a mortgage, and nothing but a mortgage.

My Lords, when the usury laws were in force and every device for evading them had to be defeated, the above language was convenient and as free from objection as most concise statements are; for every stipulation in a mortgage in favour of a mortgagee and conferring pecuniary benefits on him in addition to repayment of his principal moneys and lawful interests and costs was open to the objection that it was a cloak for usury. But now that the usury laws are abolished such language is much too wide. *Biggs* v. *Hoddinott* (1), which was approved by this House in *Noakes* v. *Rice* (2), shews it to be so.

Laying aside the usury laws and all rules to prevent their evasion, and laying also aside all considerations of fraud, undue influence, oppression, and illegality on other grounds, I am not aware of any authority which invalidates a contract between a mortgagor and a mortgagee unless it affects or purports to affect the property mortgaged, or the right to redeem it. Any contract which does that has always been held invalid in equity, and must now be treated as invalid by all Courts. The restoration of the mortgaged property to the mortgagor on performance of the obligation to secure which it was mortgaged is the grand object which Courts of Equity have always steadily kept in view and insisted on, all agreements to the contrary notwithstanding. The wasting away of leasehold or other property does not affect the principle, but only modifies its application. I hope that nothing which ever has fallen from me, or which may fall from me now, will cast any doubt on this matter. But beyond that I am not prepared to go. I cannot bring myself to believe that it is part of the law of this country that mortgagors and mortgagees cannot make what bargains they like with each other so long as such bargains are not inconsistent with the right of the mortgagor to redeem the

(1) [1898] 2 Ch. 307. (2) [1902] A. C. 24.

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property mortgaged by discharging the debt or obligation to secure which the mortgage was effected. I have given my reasons already for holding that this principle is not infringed in this case.

Upon the merits, therefore, my opinion is that Bigham J. and the Court of Appeal were right in giving judgment for the plaintiff.

There remains, thirdly, the point of form. The judgment as drawn up is against the two defendants jointly; but they were sued on different contracts, and in strictness the judgment should have been drawn up accordingly, i.e., there should have been two judgments for the same sum, one against each defendant, but so worded as to prevent the plaintiff from being paid his damages twice over; for it is plain that the jury did not intend to give the plaintiff two sums of 750*l*. The form of the judgment was not alluded to before Bigham J. nor before the Court of Appeal. If your Lordships had agreed with me it would not have been necessary to disturb the form of the order, for although technically irregular it does no injustice to any of the parties. Neither is it necessary to notice the irregularity, as the judgment is to be reversed as to both defendants. But if your Lordships had allowed the appeal as to William Bradley's mortgage, but had affirmed the judgment as to James Bradley, I submit to your Lordships that the proper course would have been to reverse the judgment so far as it affects William Bradley, and leave it standing as a separate judgment as against James Bradley.

In my opinion, however, the appeal should simply be dismissed with costs.

Order of the Court of Appeal and judgment of Bigham J. reversed with costs here and below: judgment entered for the appellants: cause remitted to the King's Bench Division.

Lords' Journals, May 11, 1903.

Solicitors: *Merriman, White & Thompson; W. A. Crump & Son.*

[HOUSE OF LORDS.]

UPPERTON (PAUPER) . . . . . APPELLANT;

AND

SIR MATTHEW WHITE RIDLEY AND ANOTHER . . . . . } RESPONDENTS.

H. L. (E.)
1903
May 26.

Police—Pension—Special Duty Allowance—"Annual Pay"—Police Act, 1890 (*c.* 45), *Sched. I., Rules* 1, 11.

By the Police Act, 1890, a constable who has completed a certain number of years' approved service is entitled to a pension which is to be "calculated according to the amount of his annual pay at the date of his retirement."

A constable at the date of his retirement was receiving 39*s.* a week, namely, 32*s.* being the ordinary pay of his rank and service, and 7*s.* in respect of special duty which he had performed for some years. He signed the weekly pay-lists in which the 32*s.* was entered in a column headed "Amount of Pay," and the 7*s.* in a column headed "Allowance for Special Duties":—

Held, that the 7*s.* a week formed no part of his "pay" for the purpose of calculating his pension.

By Lord Davey: It would have formed part of his "pay" if he had not by signing the weekly pay-sheets in that form contracted himself out of the right to claim it.

The decision of the Court of Appeal, [1901] 1 K. B. 384, affirmed.

THIS appeal arose upon a case stated by quarter sessions for the opinion of the Court, which is set forth verbatim in both the reports below. Briefly, the facts stood thus. The appellant at the date of his retirement in January, 1899, had completed more than twenty-five years' approved service as a police constable, and for nearly five years had performed special permanent duties at the House of Lords, for which he was chosen by the police commissioners. He received every week 39*s.*; namely, 32*s.*, being the ordinary pay of a constable of his rank and service, and 7*s.* in respect of the special duty at the House of Lords. It was stated by the chief clerk to the commissioners that they were not bound to pay him the 7*s.* for the special duty, but that it is done partly as a recognition of the good

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conduct for which a constable is placed on special service, and partly because by being withdrawn from ordinary duty he loses to some extent his chance of promotion. From the 32*s.*, 7*d.* was deducted as a contribution towards the pension fund under s. 15 of the Police Act, 1890. The 7*s.* was paid without deduction. The appellant signed the weekly pay-list in which the 32*s.* appeared in the column headed "Amount of Pay," and the 7*s.* in the column headed "Allowance for Special Duties," along with allowances in lieu of coals and boots. The respondents awarded the appellant a pension calculated on the 32*s.* alone.

The only question on this appeal was whether the 7*s.*, though called an allowance, was "pay" within the Police Act, 1890, and as such ought to have been taken into consideration in calculating the pension due to the appellant.

The Queen's Bench Division (Channell J., Bucknill J. dissenting) held that the 7*s.* was not part of the pay for the purpose of calculating the pension. (1) This decision was affirmed by the Court of Appeal. (2)

March 13, 16. *Pickersgill* and *W. W. Warren*, for the appellant. By the Police Act, 1890, Sched. I., rules 1, 11, the appellant was entitled to a pension "to be calculated according to the amount of his 'annual pay' at the date of his retirement." The 7*s.* was part of his pay. True, it was called an allowance, and was signed for by him as an allowance. But it was an allowance of pay, paid in hard cash, not in some equivalent of food or clothes or the like. Looking at the word "pay" as used in the Metropolitan Police Acts, 1829 and 1839, and in the Act of 1890, it seems to be intended to include all payments of money whether ordinary or special or in the nature of allowances or salaries. It is a hardship if the appellant, after giving up his chance of promotion and increased wages which would have entitled him to an increased pension, is not entitled to the pension as now claimed. It was not through his default that no deduction was made from the 7*s.* towards

(1) [1900] 1 Q. B. 680. (2) [1901] 1 K. B. 384.

the pension fund: and see s. 30, sub-s. 10. If it is right to take into account the good service allowance granted to the senior superintendents of this force in calculating their pensions, it is not right to exclude the appellant.

Macmorran, K.C., and *Grain*, for the respondents.

Pickersgill, in reply.

The House took time for consideration.

May 26. EARL OF HALSBURY L.C. My Lords, notwithstanding the very able and clear argument of Mr. Pickersgill, I cannot doubt that the respondents are entitled to our judgment.

Treating the conditions of service as the contract, the words "the constable's annual pay" have both from the language itself and by practice received an interpretation fatal to the appellant's contention. Indeed, if one analyzes the arguments used they are rather directed to shew that the law ought to be different from what it is than to the construction of the language itself. They amount to this: that it is hard upon a constable if he does not get a pension calculated upon the whole amount of the remuneration for his services, but only on the amount of his "annual pay." Now, whether or not it would have been more satisfactory that the whole amount of the constable's remuneration should be included in the calculation when the amount of his pension was to be determined is a question with which I have nothing to do. I am of opinion that that has not been done, and I cannot construe the Act so as to do what I may think more expedient. My duty is simply to give an interpretation to the language actually employed, and I cannot doubt that the "constable's annual pay" means what the Court below has declared it to mean, namely, the ordinary pay of his rank, and that that term was not intended to bring within its scope the remuneration for other services, however meritorious they may be.

It appears to me, therefore, that upon that very short question the only answer can be that the constable is only entitled to have his pension calculated upon his annual pay, giving to

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those words the construction which, according to their natural meaning, they themselves bear, the construction which ever since the Act passed they have received in practice, and which has been accepted by those who have taken service in the police force.

For these reasons I move your Lordships that this appeal be dismissed.

LORD MACNAGHTEN. My Lords, I am sorry to say I find myself compelled to come to the same conclusion as my noble and learned friend on the Woolsack. I regret the result, because I am afraid the persons most affected may think they have been hardly dealt with. At first sight it is not easy to see the difference between annual pay and an annual payment, or to understand why an annual allowance in money to a police constable engaged on permanent employment as a constable in the discharge of exceptional services should not be regarded as part and parcel of his annual pay, and as such be taken into account in calculating the amount of his pension on retirement.

It must seem rather hard that such an annual payment should be excluded from the computation, when it is borne in mind that selection for these exceptional services is the reward of good conduct, and may interfere with the constable's chance of promotion; and that in the case of the eight senior superintendents a similar allowance is taken into consideration in calculating their pensions. But, my Lords, after considering the conditions of service signed by the appellant and the Act of 1890, the provisions of which in regard to pension the appellant elected to accept, I am of opinion that nothing is to be taken into account in calculating a retiring pension but the annual pay for which the constable contracted to serve—that is, the annual pay of the rank to which he may belong at the date of his retirement.

The matter, I think, is made tolerably plain if you look at the General Rules in Part III. of the schedule which, by s. 3, sub-s. 7, of the Act are declared to be applicable to all pensions granted under the Act. Rule 11 in Part III. of the schedule declares that the pension of a constable shall be calculated

according to the amount of his annual pay at the date of his retirement, and then sub-s. (*c*) explains that where a constable has in the course of the three years before the date of his retirement been in more than one rank, his annual pay at the date of retirement shall be deemed to be the average annual amount of pay received by him for the said three years. This, I think, shews that the annual pay on which the calculation is to be made is the annual pay of the rank to which he belongs at the time of retirement, except in the particular case specified in sub-s. (*c*)

LORD DAVEY. My Lords, the appellant joined the metropolitan police force on December 30, 1872, and on January 1, 1899, he was entitled as of right to retire with a pension for life of two-thirds of his annual pay at the date of his retirement. The question is what was his annual pay for this purpose at this date?

In March, 1894, the appellant was selected by the commissioners of police for permanent duty at this House, and continued to serve in that capacity until the date of his retirement; and during that period he was paid every week the sum of 39*s.* made up as follows: 32*s.* being the ordinary pay of a constable of his rank and service, and an additional sum of 7*s.* in respect of the special duty in which he was employed.

In Sched. I., Part III., sub-s. 11, of the Police Act, 1890, it is provided that for the purposes of the Act a pension or gratuity to a constable shall be calculated according to the amount of his annual pay at the date of his retirement. There is no definition of the word "pay" in the Act. By the (Metropolitan) Police Act, 1829, the receiver is directed to pay such "salaries, wages, and allowances" as the Secretary of State directs. And by the (Metropolitan) Police Act, 1839 (s. 9), a return is directed to be made to Parliament in each year of the number of constables in each class "with the salaries and allowances enjoyed by each class"; (s. 15) it is provided that a constable resigning without leave shall forfeit all arrears of "pay"; (s. 22) a maximum of 2*l.* 10*s.* per cent. is to be deducted from the "pay" of constables to form a

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superannuation fund; and (s. 23) the amount of superannuation allowance is to be regulated by the amount of "pay" of the retiring constable in certain defined proportions. The word "pay" is used three times in the body of the Act of 1890, which is a general Police Act. By s. 15 a rateable deduction and stoppages during sickness, and fines for misconduct are authorized to be made from the pay of every constable, and the amount of such deductions is directed to be carried to the pension fund (s. 16); and by s. 20 regulations are authorized to be made with respect to such deductions and stoppages from "pay." The conclusion to which I come from examination of the Acts is that the word "pay" is a word of general import, including all periodic payments regularly made to a constable for his services as such, whether ordinary or special, but not including casual receipts or allowances properly so called in lieu of emoluments in kind, such as lodgings, uniform, or boots.

The payment of 7*s*. per week to the appellant is called an "allowance," but it seems to me to differ altogether from such emoluments as I have referred to, and to be in the nature of extra pay when employed on a particular service. The chief clerk to the commissioners says that they were under no obligation to pay the appellant the additional sum of 7*s*. even while he remained on special service. This may be so, but appears to me immaterial. The case finds that he was on permanent duty, and that the extra sum was paid to him regularly for five years, and, as I think, as pay for the performance of special duties. And it must be taken, I think, that the payment was made with the sanction of the Secretary of State. No doubt he was selected for these duties of a responsible character involving the exercise of discretion and judgment partly as a recognition of his past good conduct, and the additional payment is awarded partly because, being withdrawn from ordinary duty, he loses to some extent his chance of promotion; but these considerations do not appear to me to affect the nature of the payment.

If, therefore, the question were to be decided on the construction of the Act of Parliament alone, I should be of opinion

that this payment of 7*s*. per week was extra pay, and was as truly part of the constable's pay at the time of his retirement within the meaning of the Act of 1890 as the ordinary pay of his class. But I think it was competent for the constable to contract himself out of the Act, and to agree that extra pay for any special duties should not be reckoned as part of his pay for the purpose of fixing the amount of his pension on retirement. And this, I think, is what he has done by signing the weekly pay-sheets in which his ordinary pay only is entered under the column entitled "Amount of Pay," and this payment for special duties is entered as an allowance, together with the allowances properly so called for lodgings, &c. This shews the terms upon which the extra allowance of 7*s*. a week was made to the constable and the terms upon which that allowance was accepted by him. It is true, as the learned counsel said, that the commissioners could not alter the Act by calling a thing by a wrong name; but I think the appellant could competently renounce a prospective benefit to himself although secured to him by statute.

On this ground I think that the appeal fails.

LORD ROBERTSON. My Lords, I concur.

LORD LINDLEY. My Lords, in order to determine the meaning of "annual pay" in the 1st schedule to the Police Act, 1890, it must be remembered that this Act is one of a series referred to in s. 38, and some of which are enumerated in the 5th schedule. It must also be remembered that the Act of 1890 applies, not only to the metropolitan police, but to the police force throughout England, except in the City of London. This appeal relates to the metropolitan police. The Act of 1890 does not fix the amount of pension payable to any particular person, but it entitles police constables to pensions on certain conditions; it fixes the maximum and minimum limits of such pensions; and it leaves the amount within these limits to be fixed by the police authority, which in this case is the Secretary of State: see ss. 1, 3, 32, 33, and Scheds. I. and III. The same authority fixes the pay

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which police constables are to receive whilst in the police force (10 Geo. 4, c. 44, s. 12), and also the stoppages which may be made from their pay during sickness (53 & 54 Vict. c. 45, s. 20).

The Secretary of State has issued a scale of pay and also regulations or conditions of employment which constables are required to sign, and which the appellant did sign. He also signed weekly pay-sheets. These regulations and pay-sheets cannot be properly disregarded. Indeed, as pointed out by the Master of the Rolls, apart from the regulations and scale of pay, the appellant could not establish his claim to any definite pay whatever. They entitled him to pay of 30*s.* a week, which sum, however, was afterwards increased to 32*s.* a week. This was his pay when in the police force.

He contends that as he was paid 7*s.* a week more for some years for special services which he rendered, this additional sum ought to be added to his pay for the purpose of computing his pension. But this is to treat the 7*s.* a week now in a way different from that in which it was treated before the appellant's retirement. His pay for all purposes was what the police authority fixed as his pay; and I can find nothing in the Act of 1890 which justifies your Lordships in holding it to be more. The word "pay" is used in ss. 15, 16, and 20 of the Act, and has always been understood to mean the pay fixed by the police authority to the exclusion of extra allowances, gratuities, and emoluments, which are not regarded as the "pay" of those who receive them. There is nothing in the Act of 1890 to shew that pay in that Act and its schedules means anything more. Nor can I discover anything in the Act which shews that the word "pay" in the expression "annual pay" means more after a man's retirement than it meant before. The introduction of the word "emoluments" in s. 32, sub-s. 5, seems to shew that pay does not include all remuneration. Moreover, the rules in Part III. of the 1st schedule throw some light on the meaning of "annual pay." The rule 11 (*c*) indicated that what is meant is the ordinary pay of the rank to which the retiring constable belonged. This appears to me to be its clear meaning in the

regulations, and to be the true meaning in the 1st schedule to the Act itself.

In my opinion, therefore, the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, May 26, 1903.

Solicitors: *Mann & Crimp; Wontner & Sons.*

[HOUSE OF LORDS.]

LONDON AND NORTH WESTERN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

WALKER AND ANOTHER . . . . . RESPONDENTS.

Railway—Minerals—Repeal of prior Act—Reservation of Vested Rights—Arbitration and Award Ultra Vires—Costs of Arbitration—Lands Clauses Consolidation Act, 1845 (*c.* 18), *s.* 34.

Land was bought by a railway company in 1839, the conveyance being expressed to be in accordance with a special Act by which minerals were to be deemed to be excepted out of the purchase and the mining rights were defined. A special Act of 1846 repealed the prior Act with a proviso that the repeal should not affect any conveyance, contract, or thing executed, made or done under the repealed Act. The Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, were incorporated in the Act of 1846. The owner of minerals under the land gave the company notice of his intention to work the minerals, and claiming that the mining rights were regulated by the Railways Clauses Act, 1845, required an arbitration under the Lands Clauses Act, 1845. The company attended the arbitration under protest, and the umpire made an award giving the owner of the minerals purchase-money and compensatio under the Railways Clauses Act, 1845. The owner having sued the company on the award to recover the sum awarded and the costs of the arbitration:—

Held, that the effect of the proviso in the Act of 1846 was that the mining rights were regulated by the repealed Act and not by the Railways Clauses Act, 1845; that the arbitration and award were ultra vires, and

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that the owner of the minerals was not entitled to the sum awarded or to the costs of the arbitration.

The reasoning of the Court of Appeal on the above points, [1899] 1 Q. B. 921, disapproved, for the reasons there given by Collins L.J.

BY special Acts of 1833 (c. xxxvi.) and 1835 (c. lvi.) a railway company was empowered to make a railway and acquire land. The minerals were to be deemed to be excepted out of the purchase of the lands, and the mining rights were defined. In 1839 the predecessors in title of the respondents sold land to the railway company, and the conveyance was expressed to be according to the true intent and meaning of those Acts.

By a special Act of 1846 (c. cciv.) the Acts of 1833 and 1835 were repealed (s. 1), with a proviso that the repeal should not annul or in anywise prejudice or affect any purchase, sale, conveyance, grant, contract, security, act, matter or thing theretofore made, done, committed or executed under or by virtue or in pursuance of the repealed Acts of 1833 and 1835, but that all such purchases, &c., should be as good, valid, and effectual to all intents and purposes whatsoever as if the Acts had not been repealed.

The Act of 1846 dissolved the existing company and other railway companies, incorporated the appellants, and vested the railways and effects in the appellants. The Act by s. 2 incorporated the Railways Clauses Consolidation Act, 1845, which was to be read so far as was applicable, and was not modified by or inconsistent with the provisions of the Act of 1846, as part of that Act and as if the railways and works had been made under the Act of 1845 instead of under the repealed Acts. (1) The Lands Clauses Consolidation Act, 1845, was also incorporated in the Act of 1846.

In 1894 the respondents, as owners of minerals under and adjoining the land conveyed in 1839, gave the appellants notice of their intention to work the minerals. The appellants gave a counter-notice of their intention to purchase a portion. The respondents claimed for the purchase of the portion and compensation for the injurious affection of the remainder and

(1) The material parts of s. 2 are set out [1899] 1 Q. B. at p. 923, and again at pp. 941, 942 by Collins L.J.

required the compensation to be assessed by arbitration under the Lands Clauses Act, 1845. The company attended the arbitration under protest, contending that the mining rights were regulated by the repealed Acts of 1833 and 1835, and not by the later Acts. The company was ordered by mandamus to take up the award, the Court of Appeal (A. L. Smith and Romer L.JJ., Collins L.J. dissenting) holding that the mining provisions of the Railways Clauses Act, 1845, were substituted for the mining provisions of the repealed Acts of 1833 and 1835. (1) On appeal, this House held that the company must take up the award, but left open the questions arising upon this appeal. (2) The respondents having sued the appellants claiming the purchase-money and compensation awarded to them, and the costs of the arbitration, Wright J. gave judgment for the respondents for the amount awarded, following the above decision of the Court of Appeal, and this decision was affirmed by the Court of Appeal for the same reason, and without argument. The railway company brought this appeal.

1902. Dec. 1, 2, 4. *Sir Edward Clarke, K.C.*, and *Page, K.C.* (*A. Underhill* with them), for the appellants. In substance this is an appeal from the decision of the Court of Appeal in *Reg.* v. *London and North Western Ry. Co.* (1), which was followed below. The mining rights given by the Railways Clauses Consolidation Act, 1845, are much more advantageous to the respondents than those given by the repealed Acts of 1833 and 1835. Hence the respondents' claim now in issue. The question turns on the true construction of the proviso or saving clause in the Act of 1846. Reading that proviso in its natural sense and in view of the principle that vested rights are not held to be destroyed except by plain words, the rights created under the earlier Acts are preserved, and therefore the provisions of the Railways Clauses Act, 1845, incorporated in the Act of 1846, have no application to the mining rights now in question. They are regulated by the repealed Acts. There is nothing in the Act of 1846 to interfere with or abrogate rights

(1) [1899] 1 Q. B. 921. (2) [1900] A. C. 109.

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already acquired. The incorporation of the Railway Clauses Act is qualified and limited. It is only "so far as the same is applicable and is not modified by this Act or inconsistent with the provisions thereof." The application of the mineral clauses of the Railways Clauses Act would be wholly inconsistent with the proviso saving vested rights in the Act of 1846. *North Eastern Ry. Co.* v. *Crosland* (1) is in point: see also *Caledonian Ry. Co.* v. *Sprot.* (2)

Cohen, K.C., and *W. J. Noble*, for the respondents, contended that the judgments of A. L. Smith and Romer L.JJ. were right, but that in any event the respondents were entitled to their costs of the arbitration, the amount awarded exceeding the sum offered, and referred to *Capell* v. *Great Western Ry. Co.* (3)

Page, K.C., in reply.

The House took time for consideration.

1903. May 25, 26. EARL OF HALSBURY L.C. My Lords, in this case the controversy between the parties is narrowed down to a very small point, namely, What is the true construction of the Act of 9 & 10 Vict. c. cciv.? If the construction is that which is to be gathered from the ordinary meaning of the language employed in the Act, the decision cannot be doubtful, and I am unable to discover any reason why that ordinary meaning should not be attached to the words used. Romer L.J.—with whom I am, however, wholly unable to agree—puts the point very plainly when he says that to hold that the North Western Railway Company could still resort to the abolished rights as regards minerals under the repealed Act of 1833 would be out of all reason, and is not the true effect of the legislation relating thereto.

If I understand the Lord Justice's reasoning, he qualifies the plain language of the statute by the suggestion, which indeed he makes in terms, that the saving clauses were intended to apply as against the railway company and in favour of the

(1) (1862) 32 L. J. (Ch.) 353; 2 J. & H. 565; 4 D. F. & J. 550.
(2) (1856) 2 Macq. 449.
(3) (1883) 11 Q. B. D. 345.

persons in respect of whom and from whom those rights were obtained. The Lord Justice suggests that such words were inserted in the statute for the protection of landowners against the railway company, and cannot be appealed to to protect the railway company; but with all the respect which I unfeignedly feel for any view of the Lord Justice, I think there is no foundation for any such qualification. I think the general question has been so dealt with by Lord Kingsdown in this House that it is no longer open to controversy what the true effect of such words is. I believe that the decision of this House in *Elliot* v. *North Eastern Ry. Co.* (1) is absolutely conclusive of the question before your Lordships. [His Lordship read a passage from Lord Kingsdown's judgment on pp. 362, 363.]

My Lords, that being the state of the law, let us now see what is the language of the instrument by which it is suggested that the old rights (to use the language of Romer L.J.) are abolished. After reciting the Acts in question it proceeds thus: [His Lordship read the proviso.]

My Lords, I am unable to conjecture by what language the provisions and incidents belonging to the conveyances which have been so protected could have been protected by human language if that is not sufficient; and it is only necessary to point out that, in the face of that, the judgment of the majority of the Court of Appeal appears to suggest that, whatever the effect of the original statute was, the repeal has so far affected the conveyances made in pursuance of the powers of the Act that those rights preserved by that language are now gone, and that one must apply oneself to the later Acts, in particular the Railways Clauses Act, to ascertain what are the rights of the parties in respect of those very conveyances and in respect of the lands acquired under those conveyances.

My Lords, I am unable to follow any such reasoning. It appears to me that the manifest effect of the original conveyance was this: Whatever the rights were, whatever the respective parties agreed to, was measured in respect of the compensation made for it or the money paid for it in respect of

(1) (1863) 10 H. L. C. 333.

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the rights so given. I am unable even to comprehend what the Lord Justice suggests—that the rights of one of the parties to the contract or conveyance can be preserved by the statute without reference to the rights of the other. If the conveyance stands, it stands for all purposes. If the rights of one of the parties are preserved, the rights of the other party are preserved also. It appears to me that the language which I have quoted from Lord Kingsdown is absolutely conclusive, and applies exactly to the present case. The fallacy of the reasoning to which I have adverted seems to me to lie in this—that the Lord Justice assumes that the rights as regarded minerals were abolished, and he emphasizes the fact that the Act was repealed without apparently in that part of his judgment adverting to the fact that the repeal was not to affect any "purchase, sale," &c.

My Lords, I think it unnecessary to proceed further in discussing the question of what has happened. I do not think any of the learned judges have suggested that the railway company, in respect of the conduct of the arbitration, or the preventing, as they did, the proceedings from going on without their intervention, have prejudiced the rights which they possessed.

As to the costs of the arbitration, it is contended that the person who has initiated the proceedings and maintained that which all your Lordships have held to be the wrong course is nevertheless to get his costs. Anything more unjust and unreasonable can hardly be imagined. The appellants went to the arbitration under protest, contending that there was no authority for it. They did not forfeit their right to contest the award when it was made. That is the familiar rule of common law, and to hold that the Lands Clauses Act gives the costs of an arbitration which there was no authority to hold at all would be reducing the law to an absurdity. I move, your Lordships, that the order of the Court of Appeal be reversed, and that judgment be entered for the defendants.

LORD SHAND. My Lords, I am of the same opinion. I agree in thinking that the rights of the railway company and

of the respondents are governed by the Act of 1833, and not by the Railways Clauses Consolidation Act of 1845, and that the view of Collins M.R. was right. In the repeal of the old Acts existing rights under these Acts are saved, and are not meant to be affected by the later legislation as contended for by the respondents. The case of the *North Eastern Ry. Co.* v. *Crosland* (1) and the case of *Elliot* v. *North Eastern Ry. Co.* (2) are directly in point.

As to the costs of the arbitration the appellants protested, and rightly protested, that there was no jurisdiction. That being so, it is out of the question that they should be held liable for the costs.

LORD DAVEY. My Lords, the first question in this appeal is a short one, and turns on the construction of the conveyance to the predecessors of the appellants and the Act of 1833. The conveyance, which is made in the form prescribed by the Act, did not have the effect which by common law it would have had, of passing the minerals as well as the surface. There is a statutory reservation of the mines to the vendor, and he is at liberty to work them; but the vendor cannot, in my opinion, avail himself of that privilege and disregard the conditions imposed by the Act on the working of the minerals. And this is made clear beyond controversy by the words at the end of the habendum, "according to the true intent and meaning of the said Acts."

The Act of 1846 repeals the Act of 1833, and by incorporating the Railways Clauses Act, 1845, enacts a new set of provisions respecting the working of minerals under the railway. But the repeal is not to affect any contract or conveyance already made. If the Act of 1846 applied to the conveyance, it would have the effect of altering the conditions on which the minerals were reserved to the vendor, and give a new meaning to the conveyance different from that which it bore when it was executed.

I am, therefore, of opinion that the appellants are right, and the appeal should be allowed. I think that the decision

(1) 32 L. J. (Ch.) 353. (2) 10 H. L. C. 333.

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in *North Eastern Ry. Co.* v. *Crosland* (1) is directly in point, and I adopt the reasoning of Sir Page Wood V.-C. (2) The answer to Mr. Cohen's argument seems to me to be that the provisions of the Act of 1833 are necessarily incorporated into and form part of the contract contained in the conveyance.

As to the costs of the arbitration, which is the second claim made by the respondents, my opinion at the hearing of the appeal was that, if the award was ultra vires for want of jurisdiction, the right to costs went with it; or, in other words, the terms of the 34th section of the Lands Clauses Consolidation Act, 1845, applied only to a competent arbitration under the Act. I remain of that opinion, and will shortly state my reasons.

By s. 34 it is provided that all the costs of an arbitration under the Act to be settled by the arbitrators shall be borne by the promoters of the undertaking, except in the event of the amount awarded not exceeding the sum (if any) offered by the promoters. By the Lands Clauses Act of 1869 the costs may, on the requisition of either party, be taxed by a taxing master instead of being settled by the arbitrators. That course has been pursued in the present case. But that seems to me to make no difference in the nature of the right to the costs. The office of the taxing master is merely ministerial and does not affect the right to the costs, which must be dealt with in precisely the same way as if the amount had been settled by the arbitrators and mentioned in the award.

Your Lordships have now determined that the award in this case was without jurisdiction and therefore ultra vires, and that no action can be brought upon it for the amount of compensation awarded, and it appears to me that the award would be equally incompetent as regards the amount of the costs if it had been settled by the arbitrators, and it can make no difference that the amount of the costs was in fact ascertained by the taxing master so far as regards the right to recover them. Your Lordships were referred to the case of *Capell* v. *Great Western Ry. Co.* (3) In that case the

(1) 2 J. & H. 565; 4 D. F. & J. 550. (2) 2 J. & H. at p. 575.
(3) 11 Q. B. D. 345.

railway company gave the plaintiff notice to treat for the purchase of some land which they required, and the amount payable for the same had been determined by arbitration and the costs had been taxed. The actual point decided was that the plaintiff might sue for the costs before the execution of the conveyance, but it was considered by the Court of Appeal that that raised the question whether the plaintiff was entitled to recover and keep the costs whether he had a title to the land or not. The Court held that he had such a right. But in that case the proceedings had been initiated by the company, who desired to take the land of which the plaintiff claimed to be the owner, and there was not and could not be any suggestion that the award was either ultra vires or invalid, or that the proceedings were not under the Act. Cotton L.J. referred to the case of *Todd* v. *Metropolitan District Ry. Co.* (1) That was a case, as I said in the course of Mr. Cohen's argument, under s. 68 of the Lands Clauses Consolidation Act, in which case the landowner claimed to be entitled to compensation for his premises being injuriously affected under s. 68. It went to a jury, and the jury found a verdict for the plaintiff, assessing the damages at 200*l.*, and the costs were afterwards taxed. On an action being brought for the amount and costs the Court of Common Pleas held that the alleged damage was not the subject of compensation under the Act, and that the plaintiff was not entitled either to the amount assessed or to the costs which were separately claimed under s. 51. My Lords, the section relating to inquiries before a jury is in the same terms as s. 34 which is now in question. "On every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking." That case seems to me directly in point upon the question.

When the present case was before this House on a former occasion (2), your Lordships did not express any opinion on the question whether the award was or was not ultra vires. All this House decided was that there was ex facie a regularly

(1) (1871) 24 L. T. 435. (2) [1900] A. C. 109.

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constituted tribunal of arbitration under the Lands Clauses Act, and the company was therefore bound to take up the award, and that it was premature at that stage to raise the question which is the subject of this appeal. My noble and learned friend, Lord Macnaghten, said in the course of his judgment that taking up the award would not prejudice the rights of the parties when they came to litigate the question after they knew what the award was, and it would be perfectly open to them to raise any question thereafter.

I am therefore of opinion that the appeal should succeed both as to the costs of the arbitration and as to the amount awarded.

LORD ROBERTSON. My Lords, I agree. That the mining clauses of the general Act of 1845 are more favourable to the respondents than the mining clauses of the Acts of 1833 and 1835 is sufficiently evidenced by this litigation. If the mining clauses of the earlier Acts are imported into the conveyance of 1839, under which the appellants hold this part of their railway, the respondents can only succeed if the Act of 1846 took away from the appellants a right acquired by conveyance. This result is not only incredible on grounds of principle, unless expressed with absolute plainness, but it is directly negatived by the saving clause in the Act of 1846, which saves conveyances, and of course saves them in their integrity.

The only question, therefore, seems to be whether the mining clauses of 1833 and 1835 are part of the contract of 1839 as expressed in the conveyance. Now the words of the conveyance which refer to the Acts of 1833 and 1835 are general; and they seem to measure, by those statutes, the right which the company are acquiring for 1680*l*. I find it difficult to think of anything in the Acts more germane to the subject of this conveyance than the mining sections, and I cannot doubt that they contributed to determine the price paid. Entirely agreeing, as I do, in the reasoning of Collins L.J., I do not deem it necessary further to develop the subject.

As to the costs of the arbitration, the only claim the respondents can make is under the Act of 1845, which we

have held not to apply to the case. The appellants have never departed from this contention which we have sustained.

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Order of the Court of Appeal and judgment of Wright J. reversed with costs here and below: judgment entered for the appellants: cause remitted to the King's Bench Division.

Lords' Journals, May 26, 1903.

Solicitors: *C. H. Mason; Whitfield & Harrison.*

[HOUSE OF LORDS.]

SECRETARY OF STATE IN COUNCIL OF INDIA . . . . . } APPELLANT;

AND

SIR ANDREW SCOBLE AND OTHERS . RESPONDENTS.

H. L. (E.) 1903 June 15.

Revenue—Income Tax—Annuity—Purchase-money—Payment by Annual Instalments with Interest—Income Tax Acts, 1842 (*c.* 35) *and* 1853 (*c.* 34), *Scheds. C and D.*

The Secretary of State for India had power by contract to purchase a railway, paying for the purchase the full value of all the shares or capital stock of the railway company, with the option of paying instead of a gross sum "an annuity" for a term of years, the rate of interest to be used in calculating the annuity being determined in a specified way. The Secretary of State purchased the railway and exercised the option to pay an annuity instead of a gross sum. The annuity was paid half-yearly, each payment representing, as to part, an instalment of the purchase-money, and as to the rest, interest on the amount of the purchase-money unpaid:—

Held, that the Income Tax Acts do not tax capital as income, and that income tax was not payable upon that part of the annuity which represented capital.

The decision of the Court of Appeal, [1903] 1 K. B. 494, affirmed.

By a contract made in 1849 between the East India Company and the Great Indian Peninsula Railway Company it was agreed that the railway company should construct a railway, and the East India Company should provide the land and grant

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a lease for ninety-nine years; that after a certain period the East India Company might give notice of their intention to purchase the railway and works, and thereupon the land with the railway and works should become the property of the East India Company as the owners by purchase on account of the Government of India, and the East India Company should be bound to pay for the purchase the full amount of the value of all the shares or capital stock in the railway company. By clause 26 the East India Company might instead of paying a gross sum for the purchase declare by notice to the railway company their option to pay "an annuity" from the time when the gross amount would be payable and to continue during the residue of the term of ninety-nine years, the annuity to be payable on two half-yearly days, the interest to be used in calculating the annuity being determined by the average rate of interest during the preceding two years received in London upon public obligations of the East India Company, and to be ascertained by reference to the governor or deputy governor of the Bank of England.

The railway was constructed, and in 1899 the Secretary of State for India (in whom the powers of the East India Company were vested by the Act of 1858, c. 106, for the better government of India) gave notice to the railway company of his intention to purchase the railway and works. The purchase-money was determined at 34,850,000*l.* odd, and the Secretary of State declared his option instead of paying the gross amount to pay an annuity. The rate of interest was ascertained to be 2*l.* 17*s.* per cent., and the annuity was fixed at 1,300,000*l.* odd, payable in equal moieties half-yearly. By ss. 11 and 12 of the Great Indian Peninsula Railway Purchase Act, 1900 (c. cxxxviii.), the annuity was charged on the revenues of India, the first payment to be made January 1, 1901, and the subsequent payments half-yearly till 1948.

The Secretary of State having deducted income tax upon the whole of the first two half-yearly payments, the respondents, as the annuity trustees under the Act of 1900, brought an action against the Secretary of State to recover so much of the tax as was a tax on payment of the instalments of the

purchase-money, contending that so much of each payment as represented capital was not liable to income-tax; income tax being chargeable only upon interest. Phillimore J. gave judgment for the defendant. (1) The Court of Appeal (Vaughan Williams, Stirling, and Mathew L.JJ.) reversed this decision and gave the plaintiffs judgment for the amounts they claimed, declaring that the half-yearly payments were partly a payment by instalment of the price for the purchase of the railway, and as such were payments on account and as part of the capital, and as regards the residue were payments of interest upon the part for the time being unpaid of such price, and that so much of each payment as represented capital was not liable to income tax. (2)

The defendant brought the present appeal.

Sir R. Finlay, A.-G., and *Sir E. Carson, S.-G.* (*Rowlatt* with them), for the appellant. The annual payment is called an "annuity" both in the contract of 1849 and in the Great Indian Peninsula Railway Purchase Act, 1900. It comes within the words of the Income Tax Act, 1842, s. 102, which imposes the tax upon all "annuities, yearly interest of money, or other annual payments"; and within the words of the Income Tax Act, 1853, s. 2, "all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue" (Sched. C); and "all interest of money, annuities, and other annual profits and gains, not charged by virtue of any of the other schedules contained in this Act" (Sched. D.). The railway company made the bargain that the annual payment might be substituted for the gross sum payable to the company. They cannot, therefore, contend that the payment is not an annuity, and the Income Tax Acts make no exception in favour of particular annuities. All annuities are expressly made subject to the tax. This annuity is no more exempt than an annuity bought for life or a term of years, or money invested in a lease of mines or quarries or any other wasting security, and the creation of a sinking fund to replace capital makes no difference: see per Lord Blackburn in *Coltness Iron*

(1) [1902] 2 K. B. 413. (2) [1903] 1 K. B. 494.

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Co. v. *Black* (1); and per Bramwell and Watson BB. in *Foley* v. *Fletcher*. (2) "I have always understood," said Best J. in *Winter* v. *Mouseley* (3), "the meaning of an annuity to be where the principal is gone for ever and it is satisfied by periodical payments." That is the case here.

Cripps, *K.C.*, *Danckwerts*, *K.C.*, and *T. T. Paine*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, I am not satisfied after hearing the very ingenious arguments of the Attorney-General and Solicitor-General that the Court of Appeal is not right in this case; and, inasmuch as it is the duty of those who assert and not of those who deny to establish the proposition sought to be established, I think the Crown must fail in the contention that this is "an annuity" within the meaning of the Act.

I do not at all say that the question is not surrounded by some difficulties; I think it is. The loose use of the word "annuity" undoubtedly renders a great many of the observations that have been made by the Attorney-General and Solicitor-General very relevant to the question under debate. Still, looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words), this is not the case of a purchase of an annuity; it is a case in which, under powers reserved by a contract, one of the parties agrees to buy from the other party what is their property, and what is called an "annuity" in the contract and in the statute is a mode of making the payment for that which had become a debt to be paid by the Government. That introduces this consideration: Was it the intention of the Income Tax Acts ever to tax capital as if it was income? I think it cannot be doubted, upon the language and the whole purport and meaning of the Income Tax Acts, that it never was intended to tax capital—as income at all events.

Under the circumstances I think I am at liberty so far to

(1) (1881) 6 App. Cas. 315, 336. (2) (1858) 3 H. & N. 769, 782, 784.
(3) (1819) 2 B. & Ald. 802.

analyze the nature of the transaction as to see whether this annual sum which is being paid is partly capital, or is to be treated simply as income; and I cannot disagree with what all the three learned judges of the Court of Appeal pointed out, that you start upon the inquiry into this matter with the fact of an antecedent debt which has got to be paid; and if these sums, which it cannot be denied are partly in liquidation of that debt which is due, are to be taxed as if they were income in each year, the result is that you are taxing part of the capital. As I have said, I do not think it was the intention of the Legislature to tax capital, and therefore the claim as against part of those sums fails.

My Lords, as I have already said, I do not think it is a matter on which one can dogmatize very clearly. Where you are dealing with income tax upon a rent derived from coal, you are in truth taxing that which is capital in this sense, that it is a purchase of the coal and not a mere rent. The income tax is not and cannot be, I suppose from the nature of things, cast upon absolutely logical lines, and to justify the exaction of the tax the things taxed must have been specifically made the subject of taxation, and looking at the circumstances here and the word "annuity" used in the Acts, I do not think that this case comes within the meaning which (using the Income Tax Acts themselves as the expositors of the meaning of the word) is intended by the word "annuity," and that is the only word that can be relied upon here as justifying what would be to my mind a taxation of capital.

For these reasons I come to the conclusion that the Court of Appeal were right in the conclusion at which they have arrived; and I therefore move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion, and for the same reasons. I think the case is well put in the judgment of Vaughan Williams L.J.; and, for the reasons given by the Court of Appeal and by my noble and learned friend on the Woolsack, I agree with the motion which has been proposed.

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LORD SHAND. My Lords, I am also of the same opinion. It is not disputed that the payments made under the contract embrace capital and interest, amounting to the precise amount of capital and interest stipulated for in the contract between the parties. What is called an "annuity" in this case, in my opinion, embraces not only profits but capital; there was capital being repaid, and interest paid: the interest forms the proper subject of taxation; the capital does not.

LORD DAVEY. My Lords, I also agree with the judgment of the Court of Appeal. I think that this appeal should be dismissed, and I agree with the reasons which were given for their judgment by the learned Lords Justices who gave judgment in the Court below.

My Lords, the one important fact which seems to me to determine this case is that for the purpose of ascertaining the amount of this annuity, or so-called annuity, the principal sum, the gross sum as it is called, payable by the Secretary of State had to be ascertained. That is the foundation of the whole thing. Then the amount of the annual payment is to be ascertained, by the application to that gross sum of interest the rate of which is also ascertained under clause 26 of the contract. That at once distinguishes it from the case which was put in argument, and which was put in one of the judgments referred to in *Foley* v. *Fletcher* (1), the case of the purchase of an annuity. This is not that case; but this starts with a sum being due from the Secretary of State to the company—a sum of ascertained amount—and it provides for the mode in which that sum is to be liquidated. I am, therefore, of opinion that although the annual payment is called an "annuity" it is not an "annuity" within the meaning of either Sched. C. or Sched. D. of the Income Tax Act, whichever may be the proper schedule applicable to it.

My Lords, I only desire to add that although I have come to this opinion, and I think this is the proper construction of that Act, I entirely agree with my noble and learned friend on the

(1) 3 H. & N. 769, 779.

Woolsack that the case is one of difficulty owing to the language which is used in the Income Tax Act.

LORD LINDLEY. My Lords, I am of the same opinion. The difficulty which exists is attributable entirely to the ambiguity of the word "annuity." The annuity in this case is to my mind proved to demonstration to be nothing more than the payment by equal instalments of the purchase-money for the railway with interest at the rate of 2*l.* 17*s.* per cent. The annual instalments are not all profits or gains, but are in fact partly payments of principal moneys and partly only profits in the shape of interest. I cannot with any satisfaction to myself accept the view that this is in substance the purchase of an annuity; it is nothing of the sort. For these reasons I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 15, 1903.

Solicitors: *Solicitor of Inland Revenue; White, Borrett & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1903 June 29.

ABRAM COAL COMPANY, LIMITED . APPELLANTS;

AND

SOUTHERN . . . . . RESPONDENT.

Employer and Workman—Compensation—"Earnings"—Deductions from Wages—Workmen's Compensation Act, 1897 (*c.* 37), 1*st Sched.* (1.), (*a*).

In estimating the compensation payable to an injured workman under the Workmen's Compensation Act, 1897, the word "earnings" in the Act means the sum the workman receives for his labour when he comes to it properly equipped according to the general understanding and practice in the particular trade.

From the weekly wages of a collier his employers deducted by agreement sums for cleaning lamps, supply of oil, sharpening picks, and checking weights:—

Held, that his "earnings" under the Act for the purpose of estimating compensation for injury were his full wages without the deductions.

The decision of the Court of Appeal in *Houghton* v. *Sutton Heath and Lea Green Collieries Co.*, [1901] 1 K. B. 93, approved.

IN July, 1901, Southern, a collier employed in the appellants' mines, was killed, and his widow claimed compensation from the appellants under the Workmen's Compensation Act, 1897. The man's total wages during his employment for 142 weeks amounted to over 200*l.* From his weekly wages deductions were made, by arrangement with his employers, on account of lamp-oil and cleaning lamps, pick-sharpening, and the check-weighman employed by the workmen, the total deductions for the period he was employed being over 8*l.* The only question on this appeal was whether in estimating the man's "average weekly earnings" under the Act of 1897, 1st schedule (1.), (*a*), these deductions ought to be made from his wages. The county court judge at Wigan, following *Houghton* v. *Sutton Heath and Lea Green Collieries Co.* (1), held that the deductions ought not to be made. This decision was affirmed by the Court of Appeal. The employers brought the present appeal.

Haldane, K.C., and *F. E. Smith*, for appellants. "Earnings" in the Workmen's Compensation Act, 1897, means the

(1) [1901] 1 K. B. 93.

net remuneration received by the workman, the balance he has to spend on himself. This is the ordinary popular meaning of the word, and it coincides with the scientific view taken by political economists. Pure wages are the price of labour alone; the use of tools means the employment of capital. Therefore a workman who provides his own picks, lamps, and light, and pays his own agent to check the weights, and is paid wages accordingly, receives part of those wages as interest upon his capital. That part is not wages or earnings: it is profit upon his investments. This principle is expounded in *Archer* v. *James*. (1) It is true that in the Exchequer Chamber the Court was equally divided, but the result was a decision that the employer was entitled to make deductions for light, warmth, implements, &c., from the workman's wages under the Truck Act (1 & 2 Will. 4, c. 37). The same principle applies here.

No counsel appeared for the respondent.

LORD MACNAGHTEN. My Lords, I do not think your Lordships need be troubled with the consideration of any questions of political economy or even with the provisions of the Truck Act. The Truck Act was passed for a different purpose, and it uses expressions different from those found in the statute we have now to construe. The sole question which your Lordships have to consider is what is the meaning of the word "earnings" in the Workmen's Compensation Act. There is no definition of that word in the Act, nor is there anything said there about deductions. I think the word "earnings" is used, not in the sense in which economical writers use it, but in a popular sense. The object of the Act was to determine the amount to be paid by way of compensation in the case of an accident resulting in disability or death. In the event of death there is a maximum limit fixed and a minimum limit as well. In the event of disability there is only a maximum limit. Subject to the prescribed limits or limit, as the case may be, the Act takes the workman's "earnings" as the standard of compensation. It is a rough standard of course. But it is a very obvious one, and there can be no difficulty if

(1) (1862) 2 B. & S. 61, 95; 31 L. J. (Q.B.) 153, 166.

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the word "earnings" means the full sum for which the man is engaged to work. The difficulties would be endless if the Court had to find out in each case the net remuneration received by the workman, or the balance left for him to spend on himself and his family.

My Lords, I do not think the point can be put much better than it was put by the county court judge. "I would add," said his Honour Judge Bradbury, "that a lamp and picks in proper working order seem to be looked upon in the trade as being part of the necessary equipment of a miner, to be provided by him or at his cost; without them he would not be considered to be a properly equipped miner; and I should say the word 'earnings' means the sum the workman gets for his work when he comes to it properly equipped according to the general understanding and practice in that particular trade."

I move your Lordships that the appeal be dismissed.

LORD SHAND concurred.

LORD LINDLEY. My Lords, I am of the same opinion, and I have very little to add. I think these payments, some of which are compulsory while others are not, are all really deductions from the earnings. With regard to the use of the word "earnings" in the schedule, I think it is a rough way of getting at the sum to be paid for compensation.

As regards the Truck Act, there is no analogy between it and the Act under consideration. The object of the Truck Act is very simple. It is directed to prevent an employer giving or professing to give with one hand wages which he takes away with the other. That is the object, and accordingly all kinds of deductions from wages are forbidden. The decisions upon it are of no use on the present occasion.

Order appealed from affirmed and appeal dismissed.

Lords' Journals, June 29, 1903.

Solicitors: *Rowcliffes, Rawle & Co., for Peace & Ellis, Wigan; Watkins, Son & Fletcher, Atherton.*

[HOUSE OF LORDS.]

FULLERTON AND ANOTHER . . . . APPELLANTS; AND PROVINCIAL BANK OF IRELAND . . RESPONDENTS.

H. L. (I.) 1903 July 3.

Registration of Deeds — Equitable Mortgage — Deposit of Title-deeds — Conveyance — Consideration — Antecedent Debt — Priority—Registry Act (6 *Anne* (*Ir.*) *c.* 2), *ss.* 3, 5.

A customer of a bank in Ireland having overdrawn his account and being pressed by the bank undertook by letter to deposit a title-deed of an Irish estate as security for his overdraft. He deposited the title-deed with the bank, who did not register the charge. The customer afterwards mortgaged the estate to the appellants, who registered their charge without notice of the prior charge. Upon the question of the priority of the two incumbrances:—

Held, that the customer's letter amounted to an agreement to create an equitable charge upon the estate and ought to have been registered as a conveyance under 6 Anne (Ir.), c. 2; and that in default of registration it ranked after the mortgage to the appellants.

The decision of the Irish Court of Appeal, *In re Stevenson's Estate*, [1902] I. R. 23, reversed and the judgment of Meredith J. restored.

THIS appeal turned on the construction of letters.

In the spring of 1895 Colonel Stevenson having overdrawn his account with the Provincial Bank of Ireland was asked by the bank to reduce the debt. He wrote several letters to the manager in which he said that he was buying an estate and when he received the conveyance he would deposit the deed as a security for the overdraft. In July, 1895, he deposited the conveyance with the bank. In July, 1896, he executed a mortgage of the estate in favour of the appellants. This mortgage was registered in the Dublin Registry of Deeds by the appellants without notice of the prior charge. Colonel Stevenson afterwards sold the estate under the Irish Land Purchase Acts, and it became necessary to decide the priorities of the above two incumbrances.

Meredith J. held that upon the true construction of the letters they contained an undertaking to deposit the conveyance,

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and therefore amounted to an equitable charge of the estate in favour of the bank, and that as the charge had not been registered as required by 6 Anne (Ir.), c. 2, the mortgage held by the appellants which was registered had priority over the claim of the bank. The Irish Court of Appeal (FitzGibbon and Holmes L.JJ., Walker L.J. dissenting) reversed that decision, holding that the letters did not amount to an undertaking to deposit the conveyance, that registration was therefore not necessary, and that the bank was entitled to priority over the appellants, on the principle laid down in *In re Burke*. (1) From this decision the present appeal was brought. The material parts of the letters are stated in the judgments in this House.

June 30; July 2. *Wylie*, *K.C.*, and *Henry*, *K.C.* (*R. E. Osborne* with them—Irish Bar), for the appellants, contended that the construction put by Meredith J. on the letters was the true one and that the decision of that learned judge was right.

Campbell, *S.-G.* (*Ir.*), and *Gordon*, *K.C.* (*Garrett Walker* with them—Irish Bar), for the respondents, contended that the decision of the Court of Appeal was right on two grounds: first because there was no undertaking to deposit the conveyance, only a hope that the writer might be able to make the deposit; and secondly because even if the letters did amount to an undertaking, there was no consideration for it, no forbearance or giving of time on the part of the bank; and relied on the decision of *In re Burke* (1), where it was held that the bare deposit of title-deeds unaccompanied by any writing did not require registration under 6 Anne (Ir.), c. 2, and that the deposit took priority over a subsequent deed registered without notice of the deposit.

Wylie, *K.C.*, in reply.

July 3. LORD MACNAGHTEN. My Lords, the point raised by this appeal is a short point, and not, I think, one of any great difficulty.

(1) (1881) 9 L. R. Ir. 24.

The appellants and the respondents were both equitable incumbrancers on certain property in Westmeath known as the Portlemon estate, and there is a contest for priority between them. The Portlemon estate has now been sold. But at the commencement of the contest the equity of redemption was vested in a Colonel Stevenson, who acquired the property from a Mrs. Treacy; she conveyed it to him in consideration of the sum of 8000*l.*, which was secured on the property by a legal mortgage of even date with the conveyance.

The charge in favour of the appellants (who are the trustees of Colonel Stevenson's marriage settlement) was created by a deed of mortgage dated the 29th and duly registered on the 31st of July, 1896. There is no question as to the validity or the regularity of this mortgage.

The charge in favour of the respondents was created or completed by the deposit on July 15, 1895, of the conveyance to Colonel Stevenson of the Portlemon estate. Their incumbrance is, therefore, prior in date to that of the appellants.

The respondents' case is that they have not and never had any charge upon the property in question except the charge that was created by the deposit of Colonel Stevenson's conveyance; that they had, therefore, nothing to register; that the statute of Anne has no application to their security, and that according to the law laid down in *In re Burke* (1) they are entitled to the priority which properly belongs to priority of date.

The case of the appellants is that the deposit on which the respondents rely was accompanied or preceded by certain letters leading up to the actual deposit which were sufficient to create, and which did in fact create, a valid equitable charge on Colonel Stevenson's interest in the Portlemon estate; that these letters, therefore, or some or one of them, ought to have been registered, and that for want of such registration the claim put forward on behalf of the respondents fails, and their alleged security must be held to be fraudulent and void against holders of a subsequent registered mortgage.

The whole question, therefore, depends on the meaning and

(1) 9 L. R. Ir. 24.

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effect of these letters. They were written by Colonel Stevenson to the local manager of the Provincial Bank at Londonderry, where Colonel Stevenson's account was kept.

The earliest in date is one of March 26, 1895. The others are dated May 18, May 24, and June 7. When those letters were written the conveyance of the Portlemon estate to Colonel Stevenson was not in existence—the arrangement for the sale of the property to him was only in progress. The conveyance was not executed until July 11, 1895.

I need not trouble your Lordships by reading these letters. They were read at length in the course of the argument, and they are discussed very fully in the judgments of the Court below. Throughout these letters, and more particularly in the letter of May 18, Colonel Stevenson is making out a case for indulgence and pleading for forbearance. Apparently the local manager had given him to understand that he himself was likely to get into trouble with the head office over the account, and on May 18 Colonel Stevenson writes: "All you require is a little patience, and my account will be put upon a satisfactory basis." That was the tone of the letters throughout. In addition, it is enough for me to remind your Lordships that at the outset of the correspondence on March 26, 1895, Colonel Stevenson writes: "When I receive the title-deeds of the Portlemon property from my solicitors I will have same at once lodged with you." That was a clear and definite statement on which the manager of the bank was apparently intended to rely. From that statement Colonel Stevenson never receded. He never qualified it. On the contrary, he repeated it more than once, and in one letter he refers to it as a thing which he had "undertaken."

My Lords, if these letters were serious letters meant to be taken seriously, I cannot doubt that they created a valid charge in equity attaching to Colonel Stevenson's interest in the Portlemon estate the very moment the property was conveyed to him, and carrying over his interest by way of security to the bank.

That proposition as a proposition of law was not disputed by the learned Solicitor-General. But he rested his case on

two grounds. In the first place he adopted the view taken by FitzGibbon and Holmes L.JJ. that these letters had no contractual force, that they were merely friendly letters of a temporising character and intended to put the manager off—that they were of no real importance, and that the transaction which resulted in the deposit must be taken to have commenced on the occasion of the visit of Colonel Stevenson's solicitor to the solicitor of the bank in Dublin on July 11, 1895.

My Lords, I cannot take that view, and I would point out to your Lordships that the first three letters are formal business letters beginning "Dear Sir" and addressed to "The Manager, Provincial Bank, Londonderry." The last letter no doubt begins "My dear Mr. Stuart" and contains allusions to private matters. But I am unable to understand how such allusions can detract from the force of a definite undertaking, even though the writer should mingle gossip with business.

The other point on which the learned Solicitor-General relied was that there was no proof of consideration. The promise, he said, if it was a definite promise, was "nudum pactum"—no doubt, he said, Colonel Stevenson had overdrawn his account, but there was no stipulation for forbearance for any definite time. The point does not seem to have been argued in the Courts below, though it was suggested and touched upon by FitzGibbon L.J.

My Lords, this point seems to me to be settled by authority. In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it. That proposition seems to me to be established by the case of *Alliance Bank* v. *Broom* (1), to which my noble and learned friend Lord Lindley referred yesterday, and other cases,

(1) (1864) 2 Dr. & S. 289.

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among which I may mention *Oldershaw* v. *King* (1), with the observations on that case and the case in Drewry and Smale, by Bowen L.J. in *Miles* v. *New Zealand Alford Estate Co.* (2), and I may add that the proposition seems to be good sense.

On the whole, therefore, though I am impressed by the weight which must attach to the deliberate opinion of such eminent judges as FitzGibbon L.J. and Holmes L.J., I ask your Lordships to take a different view.

I therefore move your Lordships that the appeal be allowed, and the judgment of Meredith J. restored with costs both here and below.

LORD SHAND. My Lords, I am entirely of the same opinion. I think there was an undertaking to deposit the conveyance. The effect of the correspondence is to shew that there was a large debt due to the bank on the account of Colonel Stevenson which had been overdrawn, and as I gather from the letters there was pressure for the repayment of that debt. In answer to that pressure those letters were written which led to the forbearance of the bank, and I am of opinion that that is sufficient to meet the argument on the second point.

LORD DAVEY. My Lords, it might appear to some people that the policy of the Irish Registration Act was to postpone an unregistered transfer of property to a registered one, whether the non-registration arose from negligence or inadvertence or from the fact of the transfer having been effected without any document being executed which was capable of being registered. I must express my personal regret that it was not so held, but it is too late now for your Lordships to interfere with what has become the settled law and is expressed in *In re Burke.* (3)

My Lords, I do not think that the learned judges who formed the majority in the Court of Appeal differed from Meredith J. and Walker L.J. in the law which they thought applicable to the case: their difference was as to the construction of the

(1) (1857) 2 H. & N. 517. (2) (1886) 32 Ch. D. 289.
(3) 9 L. R. Ir. 24.

letters which passed between Colonel Stevenson and Mr. Stuart, the manager of the bank at Londonderry, in the latter part of the month of May and the beginning of June, 1895. The majority of the Court below thought that those letters were only expressed in the language of expectation and hope, and that they did not express any promise or undertaking which might form a contract between Colonel Stevenson and the bank. My Lords, it appears to me to be important to consider what was the situation at that time. It was this : Mr. Stuart, the manager of the bank at Londonderry, had allowed Colonel Stevenson to overdraw his account to an extent which the directors disapproved, and apparently Mr. Stuart had been instructed by the board at Dublin to press Colonel Stevenson to reduce his overdraft. On the other hand, Colonel Stevenson had at that time contracted to purchase an estate called the Portlemon estate, but it was not yet conveyed to him. I think Colonel Stevenson clearly undertook by his first letter to lodge the deed of conveyance of the Portlemon estate when executed with the bank for the purpose of securing his overdrawn account, and I think as a matter of law that that was a promise to create an equitable mortgage of the property in favour of the bank.

There can be no possible doubt that this promise was accepted by Mr. Stuart on the part of the bank, but it is said that there was no consideration for it. Now in the letter of May 18 (that is the second letter) Colonel Stevenson writes to this effect, addressing Mr. Stuart, " All you require is a little patience and my account will be put on a satisfactory basis." I think this means, " Exercise patience and some forbearance and I will give you the required security and thus put my account in order." The bank did exercise patience, and gave some forbearance by not demanding, as they might have done, immediate payment of the debt, and by giving Colonel Stevenson the required time to effect the security. I think that such forbearance in fact, although there was no agreement by the bank to forbear suing Colonel Stevenson for any definite period, was sufficient consideration to support his promise to give the security, on the principle stated by Kindersley V.-C. in *Alliance Bank* v.

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Broom. (1) The Vice-Chancellor's judgment in that case was quoted with approval by Lord Bowen in *Miles* v. *New Zealand Alford Estate Co.* (2) as laying down a sound principle. In the case before Lord Bowen the question was whether a guarantee which had been given by the promoter of a company at a general meeting of the shareholders to guarantee a dividend of a certain amount for a certain time on the shares was given with or without consideration, and in referring to the case before him Lord Bowen said, after quoting the Vice-Chancellor's judgment: "So it will be sufficient here that the directors did forbear, if their forbearance was at the request expressed or implied of the guarantor and in consequence of his guarantee being given, and it seems to me there is no sort of necessity to discover language of any particular form, or writing of any particular character, embodying the resolution of the directors. We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between business men." My Lords, that seems to me to be directly applicable to the present question. There can be no doubt that the forbearance was given in this case, and I think it is a just inference of fact that it was given at the request of Colonel Stevenson in consequence of his undertaking to secure the account and place it on what he describes as a satisfactory basis.

I am, therefore, of opinion that the letters, reading them together, constituted a contract to create an equitable mortgage on the Portlemon estate as soon as the conveyance to Colonel Stevenson was completed. On that event taking place, the contract became absolute and bound the property in his hands. The letters, therefore, constituted a transfer to the bank of the equitable interest in the property, and constituted a conveyance within the meaning of the Registration Act. It ought, therefore, to have been registered in order to secure the priority of the bank; and not having been registered, I think the appellants who claim under a subsequent instrument which was registered are entitled to claim priority over the bank in respect of their advance.

(1) 2 Dr. & S. 289. (2) 32 Ch. D. 266, 290.

LORD ROBERTSON. My Lords, this case has been decided by the Court of Appeal on the construction of the four letters of Colonel Stevenson which have been referred to. Now I find it impossible to read the letter of March 26, 1895, otherwise than as a distinct undertaking to lodge the title-deeds as soon as they should be completed. The subsequent letters, so far from detracting from or throwing doubt on the intention and effect of this first letter, are addressed mainly to explaining the delay which had occurred in the execution, and therefore in the deposit, of the promised title-deeds: they all recognise what one of them in terms describes as an undertaking; but the importance of those subsequent letters seems to me to lie in the corroboration which they afford of what primâ facie is the natural construction of the letter of March 26, 1895. Accordingly, I do not encounter the difficulty which FitzGibbon L.J. very justly observes to arise where you have to spell out a contract from several documents.

The only remaining question is, Was it in fulfilment of this undertaking that the title-deeds were in the end delivered? That depends on Mr. Tweedy's evidence, for there is no other evidence on the subject. And Mr. Tweedy's evidence as to delay in lodging the deeds clearly points to an antecedent undertaking in fulfilment of which the title-deeds were ultimately delivered and received.

LORD LINDLEY. My Lords, I am of the same opinion. First of all comes the legal question whether an equitable charge is within the Irish statute of Anne. English lawyers are quite familiar with the fact that under the English statutes relating to the registration of deeds and conveyances the various sections of those Acts shew that an equitable charge does come within the word "conveyance." I was not myself familiar with the authorities in Ireland on the Irish statutes, but there is no dispute on the point, and Holmes L.J. says, I believe perfectly accurately: "It had been long since well settled that the statute of Queen Anne extends to any instrument in writing creating a charge on land." That was more or less doubtful in this country until it was settled by the

H. L. (I.) 1903 FULLERTON v. PROVINCIAL BANK OF IRELAND. Lord Lindley.

case of *Credland* v. *Potter* (1); and looking into the authorities which preceded that, cases may be found both ways. It was settled in that case by a judgment delivered by Lord Cairns, James L.J., and Mellish L.J., three of the most eminent men who ever sat on the bench in this country; and their decision was arrived at, not by a short-cut that the word "conveyance" includes equitable charges, but by studying the subsequent sections of the English Act of Anne, which shew that the word "conveyance" must be used in a much wider sense than conveyance by deed.

My Lords, having got that legal question clear, the only other question is, What do these letters really mean? do they constitute an equitable charge? With the greatest deference to FitzGibbon L.J. and Holmes L.J., I cannot doubt that they do. We know the position of the parties; we know that Colonel Stevenson's account at the Provincial Bank was largely overdrawn, and that, whether there was pressure or not, he was obviously very anxious about it, for that is apparent from the letters—I infer that there was some kind of pressure—and then he writes that letter of March 26 by which he undertakes to deposit the deed, when he gets it, as a security for his overdraft; what more you want to constitute an equitable charge I cannot conceive.

As regards the difficulty suggested by the Solicitor-General, that it was never so understood or so accepted by the bank manager, the inference I should draw is that it clearly was. It would, in my mind, never have been open to the slightest doubt if the deed had been given to him; but unfortunately it was given to Mr. Tweedy, who knew nothing at all about these letters, and so some confusion has arisen about the way in which the deed came to be deposited. But when you look at the letters and consider the circumstances under which the deed was deposited, it seems to me certain that Colonel Stevenson's deposit was a deposit in pursuance of his obligation.

As to the charge not having been assented to by the bank, in the first place I take it that when you offer a person some-

(1) (1874) L. R. 10 Ch. 8.

thing to his advantage, as, for example, security for a debt, it is to be inferred that he accepts it unless he dissents. I come to the conclusion that these letters having being offered to the manager for business purposes, he kept them for business purposes, and that his assent to the promise to deposit the deed must be inferred.

The only other difficulty that was suggested is the want of consideration. That is covered entirely by the case of *Alliance Bank* v. *Broom*. (1)

The result is that this appeal must be allowed.

Order of the Court of Appeal reversed; judgment of Meredith J. restored with costs here and below.

Lords' Journals, July 3, 1903.

Solicitors: *Wansey, Bowen & Co., for J. Kelso Reid, Dublin; Farrer & Co., for John Tweedy, Dublin.*

(1) 2 Dr. & S. 289.

[HOUSE OF LORDS.]

H. L. (E.) 1903 July 7.

IGOE . . . . . APPELLANT;

AND

SHANN AND OTHERS, JUSTICES . . . . RESPONDENTS.

Licensing Acts—Beerhouse—Renewal—Value of Premises—Disqualification—Break in Continuity of Licence—Licensing Act, 1872 (*c.* 94), *s.* 45.

To justify an objection to the renewal of a beerhouse licence on the ground that the premises are not of the annual value required by s. 45 of the Licensing Act, 1872, it must be shewn that the premises were not at the date of the passing of that Act licensed for the sale of intoxicating liquor for consumption thereon. The fact that there was a break in the continuity of the licence between that date and the application for the renewal is immaterial.

The decision of the Court of Appeal, [1902] 2 K. B. 467, reversed, and the decision of the King's Bench Division, [1901] 2 K. B. 740, restored.

THE Council Inn, Council Street, Hulme, Manchester, was originally licensed for the sale of beer by retail to be consumed on or off the premises in 1868, and the licence was continuously renewed down to 1886. In 1886 there was a break of continuity of two days, the licence having expired on October 10, and a fresh licence being granted on October 12. From that day the licence was continuously renewed till September 21, 1900. On that day the licensing justices refused to renew the licence upon the ground of an objection taken that the premises were not of the annual value required by s. 45 of the Licensing Act, 1872, c. 94. This decision was affirmed on appeal by the Court of quarter sessions, who stated a case containing these facts. The annual value of the premises in September, 1900, exceeded 15*l.*, but was less than 30*l.* The premises were within the city of Manchester, the population of which exceeded 100,000. The question was whether the decision of quarter sessions was right. The King's Bench Division (Lord Alverstone C.J. and Lawrance J.) reversed the decision of quarter sessions. (1) This decision was reversed by the Court of Appeal (Collins M.R. and Mathew L.J.,

(1) [1901] 2 K. B. 740.

Cozens-Hardy L.J. dissenting), who restored the decision of quarter sessions. (1) The tenant appealed.

By the Licensing Act, 1872, c. 94, s. 45, "Premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent or value or rating as a qualification for receiving any such licence.

"Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless" certain conditions as to annual value are satisfied: namely, 30*l.* as to a house such as this house.

July 6, 7. *Isaacs*, *K.C.*, and *J. R. Randolph* (*Avory*, *K.C.*, with them), for the appellant. To justify an objection to the renewal of a beerhouse licence on the ground that the premises are not of the annual value required by s. 45 of the Licensing Act, 1872, it must be shewn that the premises were "not at the time of the passing of that Act licensed for the sale of any intoxicating liquor for consumption thereupon." Those are the plain words of the second paragraph of s. 45—the only words in that section which have any bearing upon the present question. Any other construction of those words can only be arrived at by importing into the second paragraph words which are not there. The decision of this House in *Freer* v. *Murray* (2) relied on by the Court of Appeal was a decision upon different words in a different Act and has no bearing upon the present question. The fact that there was a break of two days in 1886 in the continuity of the licence is absolutely immaterial. The one material fact is that the house was licensed at the time of the passing of the Act of 1872.

C. A. Russell, *K.C.*, and *T. F. Byrne*, for the respondents. The licence held in respect of the house at the time of the passing of the Licensing Act, 1872, having lapsed in 1886, the house thereupon ceased to be qualified to receive any

(1) [1902] 2 K. B. 467. (2) [1894] A. C. 576.

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licence except upon the conditions of the annual value required by s. 45 of that Act. Those conditions apply to all premises of which the licence was not in existence continuously from August 10, 1872, down to the application for renewal. In truth since October 10, 1886, the house never was a duly licensed house: see the definition clause, s. 74. The decision of this House in *Freer* v. *Murray* (1) upon s. 19 of the Wine and Beerhouse Act, 1869, is analogous and conclusive.

Avory, K.C., in reply. This house had a licence granted in 1868 under the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), which requires a qualification of 15*l.* a year. That licence was renewed and in existence when the Act of 1872 was passed. Nothing else matters.

EARL OF HALSBURY L.C. My Lords, I think it is unnecessary to discuss *Freer* v. *Murray* (1), which was decided in this House, because it appears to me that the question we have to determine is one entirely apart and distinct from the question which then arose.

I am myself disposed to follow almost literally the decision of Cozens-Hardy L.J. The question here, and the only question, has relation to the capacity of the house to receive a licence. The capacity of this house to receive a licence is dealt with by the Act of 1840. The question which arises here is whether that capacity to receive a licence has been altered by the Act of 1872. I have to look at both statutes, and unless I am able to fix an incapacity by statute upon these premises it is obvious that the capacity to receive a licence remains where it was. I agree with Cozens-Hardy L.J. that there are no words which render a house incapable of receiving a licence except words from which this house is in terms excluded. The result, therefore, must be that the capacity to receive a licence remains. Upon the most ordinary principles of construction we are bound to construe these words as we find them, and, as the learned counsel very justly said, there is no justification here, where the language is clear and unambiguous, for introducing any other words into the statute

(1) [1894] A. C. 576.

than those which we find there. As a matter of general principle of construction I deprecate going outside the language of the statute to find some meaning for the words other than that which the words themselves in their ordinary and natural construction suggest.

At the time of the passing of the Act for some reasons (whether good or bad reasons is immaterial) the Legislature thought it right to draw a distinction between two different sets of houses, not as regards the jurisdiction of the magistrates in judging in respect of the goodness or badness of the tenant, or his fitness or unfitness, or of there being a want in the neighbourhood of licensed houses, but a distinction in respect of the material construction of the houses themselves. The Legislature determined that there should be two classes of houses, one of which should be capable of receiving a licence if the magistrates thought fit and the other not. The simple question before us in this appeal is, within which of those classes does this house come. It appears to me to be almost impossible to argue that, without introducing a considerable number of qualifying words into the language of the statute, you can say that this house is disqualified from receiving a licence if the magistrates so think fit.

Under these circumstances, and for the reasons I have given, I agree with the Lord Chief Justice and Lawrance J. and Cozens-Hardy L.J., and disagree with the learned judges who have taken the opposite view.

The only objection I entertain to the language of the Lord Chief Justice in giving his judgment is this. The Lord Chief Justice seems, in some way or other, to try to get over the interval of two days by saying that it was a substantial continuance. Now if it was necessary to have a continuity of the licence there was no such continuity; it cannot be denied that there was a complete break. But the view which I entertain of this case is that notwithstanding the complete break the language of s. 45 of the Act of 1872 is too clear to admit of doubt that this house was qualified within the meaning of that section.

I move your Lordships that the judgment of the Court of

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Appeal be reversed, and the judgment of the King's Bench Division restored.

LORD MACNAGHTEN. My Lords, I am of the same opinion. The construction adopted by the Master of the Rolls and Mathew L.J. may produce a more reasonable result, and one more in harmony with the course of legislation on this subject, but the language of the Act seems to me too clear to admit of that construction.

The second clause of s. 45 of the Act of 1872 appears to divide premises in regard to which an application for a licence may be made into two classes—(1.) those in regard to which a licence was current at the time of the passing of the Act of 1872, and (2.) those in regard to which no such licence was then current. As regards the second class, the standard of value was to be raised, while the premises in the former class were left as they were, and to have the benefit of the old standard.

I do not think that the decision of this House in *Freer* v. *Murray* (1) compels your Lordships to depart from the literal meaning of the words in the second clause of s. 45, or to introduce words which are not there.

LORD SHAND. My Lords, I am of the same opinion. I only desire to say that I construe the statutes as your Lordships have done, and I therefore come to the same result.

LORD ROBERTSON. My Lords, I entirely agree. The section seems to me to be perfectly plain in its terms, and to fix the date without reference to the continuance of the licence down to a certain time. It may be expedient or not to fix a date which may now have come to be pretty remote for the determining of the conditions under which a house shall be disqualified, but the conclusion is not a very formidable one, for the discretion of the magistrates remains, and all that is done is to leave this class of houses qualified to receive the consideration of the magistrates as under the Act of 1840.

The argument of the respondents really rested upon two

(1) [1894] A. C. 576.

grounds. First it was argued that, a licence being personal, it was necessary to consider the continuance of a licence in order to give effect to the statute, but the Act, in several of its sections other than that which we are now considering, expressly speaks of premises as being qualified as well as of individuals being qualified, and of premises being disqualified as well as of individuals being disqualified.

The other, and the main, ground upon which the respondents' argument was rested was the judgment of this House under a section of a different Act. I understand the theory upon which that decision was pronounced, and I have only to say that the phraseology, upon which everything turns, which was used in that case does not occur in the present instance, and accordingly your Lordships are entirely free to give effect to the plain terms of the Act now before you.

LORD LINDLEY. My Lords, I am entirely of the same opinion. When the Act of 1872 is looked at, and when the language of that Act and the language of the Act of 1869 are compared, it appears to me that the case of *Freer* v. *Murray* (1) cannot be safely said to be applicable at all. The language of s. 45 of the Act of 1872 runs thus—it is awkwardly expressed: "Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless" certain "conditions are satisfied." Now unless it can be said that this house was at the time of the passing of the Act an unlicensed house, that provision cannot possibly apply. I agree with Mr. Charles Russell that, in construing s. 45, you must also look at the definition of "licensed premises." But we have got here a house which was licensed in 1872 and was also licensed at the time when the renewal was applied for. Construing s. 45 and the definition clause together, it appears to me impossible to say that this house is one of those in which the condition as to extra value has to be complied with.

Then we come back to this question: Does the break

(1) [1894] A. C. 576.

H. L. (E.) 1903 IGOE v. SHANN. Lord Lindley.

which unquestionably occurred in 1886 render this house an unlicensed house ever since? I cannot so regard it. There may have been some irregularity, there may have been some oversight, there may have been even a technical want of jurisdiction, but a house which was licensed in 1868, and, with the exception of two days in 1886, has been licensed ever since, cannot, to my mind, be treated as an unlicensed house in 1872. The problem which we have to solve now did not arise in *Freer* v. *Murray*. (1) In that case the house was not a licensed house when the renewal was applied for. The effect of a break, followed, as in this case, by a succession of new licences or renewals, was not before the House on that occasion, and had not to be considered. The case was a simple one of a new licence. Here there was a licence both when the Act passed and when application was made for a renewal: the difference, to my mind, is manifest.

Order of the Court of Appeal reversed, and judgment of the King's Bench Division restored with costs here and below: cause remitted to the King's Bench Division.

Lords' Journals, July 7, 1903.

Solicitors: *R. B. Wheatly, Son & Daniell, for Cobbett, Wheeler & Cobbett, Manchester; Crowders, Vizard & Oldham, for Hockin, Raby & Beckton, Manchester.*

(1) [1894] A. C. 576.

[HOUSE OF LORDS.]

EARL OF HOME . . . . . APPELLANT;

AND

LORD BELHAVEN AND STENTON . RESPONDENT.

ET È CONTRA.

H. L. (Sc.)
1903
May 25.

Scottish Law—Superior and Vassal—Casualty or Composition—Singular Successor—Annual Value of Minerals.

The measure of the right of a superior to a casualty or composition on the entry of a singular successor is the year's rent for which the land is let for the time, and this rent includes mineral rents or royalties where coal or other minerals are being worked; and it makes no difference that the minerals are approaching exhaustion.

Duke of Hamilton v. *Allan's Trustees*, (1878) 5 R. 510, approved.

APPEAL from the First Division of the Court of Session, Scotland. (1)

This action was raised at the instance of the appellant, the Earl of Home, the immediate superior of certain lands in Scotland which contained coal and other minerals, against the respondent, Lord Belhaven and Stenton, who was a singular successor in the dominium utile of the said lands, for a casualty, composition, or fine of a year's rent or royalties amounting to about 1500*l.*, which became due to the appellant as superior on the respondent's infeftment, which took place on July 27, 1894. On the respondent being infeft in the lands he was impliedly entered as vassal to the appellant by operation of the Conveyancing and Land Transfer (Scotland) Act, 1874 (37 & 38 Vict. c. 94).

The main questions were—(1.) whether composition was payable at all in respect of mineral rents or lordships; and (2.) if it was payable, upon what basis should it be calculated or ascertained. The parties had agreed to the casualty payable for the surface, but differed as to the amount of the casualty

(1) (1900) 2 F. 1218.

H. L. (Sc.) 1903

EARL OF HOME v. LORD BELHAVEN AND STENTON.

to be paid for the minerals, which were admittedly not far off from being worked out.

The minerals were at the date of the respondent's entry let to a tenant along with certain other minerals under a lease for twenty-one years from Whitsunday, 1892, with breaks in favour of the tenant at Whitsunday, 1894, and every three years thereafter, the lease stipulating for payment of a fixed rent of 1000*l.* for each of the two years from Whitsunday, 1892, to Whitsunday, 1894, of 750*l.* yearly thereafter until certain parts of the minerals were exhausted, and subsequently of 500*l.* yearly for the remainder of its currency. It was also provided by the lease that the lessor should be entitled to claim in each case certain specified lordships in lieu of the fixed rents. The minerals had been worked by the tenants for several years prior to 1894, and down to the raising of this action. No breaks had been taken advantage of.

The appellant claimed in the name of composition—(1.) the lordships actually received by the respondent in the year of his entry; or (2.) an average of the lordships received during the previous ten years as regarded one portion of the minerals, and an average of the lordships received during the previous four years as regarded the other portion; or (3.) the fixed rent applicable to the year of the respondent's entry. The respondent contended on the other hand—(1.) that composition was not claimable at all in respect of the mineral rents or lordships; and (2.) that if it was claimable the proper mode of estimating it was not to take either the fixed rent or the lordships actually received by him, either for the year of entry or for any other period, but to ascertain the capital value as at the date of his entry of his whole estate in the minerals which then remained to be worked, and to allow 4 per cent. upon that capital value as composition.

On July 20, 1898, the Lord Ordinary (Lord Pearson) found that as regards the minerals the respondent was bound to pay the appellant in the name of composition 4 per cent. of the total amount received and to be received by the respondent in lordships or otherwise for the coal which remained unexhausted at July 27, 1894, so far as held of the appellant as superior, the

said amount being calculated (1.) after deducting the estimated public and parish burdens effeiring to the assumed annual payments on which the calculation was based, and (2.) after discounting the interest at 4 per cent. per annum from the said July 27, 1894, upon the net annual payments, but without any deduction in respect of a way-leave.

The appellant appealed to the First Division of the Court of Session, and their Lordships, in view of the importance of the case, appointed it to be argued before themselves and three of the Lords Ordinary.

On July 19, 1900, the First Division, with the addition of Lords Moncreiff, Kyllachy, and Low, by a majority consisting of Lords M'Laren, Kinnear, Kyllachy, and Low, pronounced the following interlocutor: "Alter the interlocutor reclaimed against by deleting the words 'but without any deduction in respect of way-leave for the Glenclelland minerals,' and substituting therefor the words 'and (3.) subject to deduction in respect of way-leave as may be shewn to be just and reasonable,' and to the above extent recal the said interlocutor and remit it to the Lord Ordinary to ascertain and decern for the sum payable to the appellant in terms of the said interlocutor as altered."

The Lord President (Lord Balfour) and Lords Adam and Moncreiff dissented. The majority of the judges held that in a question where the minerals were nearly exhausted, and the whole lordships which the vassal could receive therefrom would admittedly only amount to 5540*l.*, a percentage of 4 per cent. would fairly represent the constant annual value of the minerals to the vassal. The minority of the judges held that the measure of the superior's right was fixed by the words of the Act of 1469, which allowed the superior a "year's maill" or rent "as the land is set for the time"; that the actual return during the year of entry was the measure of the vassal's liability; that the return from minerals in the course of being worked was to be treated as part of the year's rent to which the superior was entitled; and that accordingly the appellant was entitled to the whole of the royalties during the year of entry, amounting to about 1500*l.*

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It was against these interlocutors that the appeal was brought. The respondent lodged a cross-appeal, contending that the minerals ought not to be taken into account at all, it only being possible in a question between superior and vassal to regard them as partes soli, and not as rent of the land.

1902. Nov. 18, 20, 21. *Scott Dickson, S.-G. for Scotland*, and *Younger* (of the Scottish Bar), for the appellant. In a question of casualties minerals must be taken into account, and since the case of *Duke of Hamilton* v. *Allan's Trustees* (1) in 1878 this has been done. By the law of Scotland mineral royalties, although they may be spoken of as a price for a part of the soil in the way of minerals, are practically "rents": *Allan's Case* (1); *Sivright* v. *Straiton Estate Co.* (2); *Sturrock* v. *Carruther's Trustees* (3): see also *Greville-Nugent* v. *Mackenzie* (4); *Campbell* v. *Wardlaw* (5); *Strain's Trustees* v. *Strain* (6); *Baillie's Trustees* v. *Baillie* (7); *Gowan* v. *Christie* (8); *Waddell* v. *Waddell* (9); *Christie* v. *Christie* (10); *Stewart* v. *Bulloch* (11); *School Board of Neilston* v. *Graham* (12), and *McLaren* v. *Burns*. (13) The above cases dispose of the cross-appeal. On the main question the casualty or fine is for the actual year 1894–95, the respondent being infeft in July, 1894. By the Conveyancing (Scotland) Act, 1874, s. 4, the superior need not give entry, for the Act gave an implied entry with the superior from the date of infeftment. The appellant relies on the Acts of 1469 (14), 1669 (15), and

(1) 5 R. 510.
(2) (1879) 6 R. 1208.
(3) (1880) 7 R. 799.
(4) [1900] A. C. 83.
(5) (1883) 8 App. Cas. 641.
(6) (1893) 20 R. 1025.
(7) (1891) 19 R. 220.
(8) (1873) L. R. 2 H. L., Sc. 273.
(9) (Jan. 21, 1812) 16 Fac. Coll. 481.
(10) (1878) 6 R. 301.
(11) (1881) 8 R. 381.
(12) (1887) 15 R. 44.
(13) (1886) 13 R. 580.
(14) The Scottish Act, 1469, c. 36 (re apprisers), enacted that .... "the over lord sall receive the creditour or ony uther byer, tennent till him, payant to the over lord a zeires maill, as the land is set for the time. And failzieing thereof, that he take the said land till himselfe, and under-gang the debtes."
(15) The Scottish Act of 1669, c. 18, asserted that there is "one year's rent of all lands, annual rents, or others apprised due and payable to the superiour of the said lands and others before he be holden to enter and infeft the compriser, and that there is the same reason in the cases of adjudications

1747 (1), and *Allan's Case* (2), and these Acts are to be read together.

These acts compelled the superior to receive first appraisers, then adjudgers, and ultimately all singular successors on payment of a year's maill of the lands—a year's maill of the lands

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as apprisings, therefore His Majesty with advice, &c., declares that the superious of lands, annual rents, and others adjudged shall not be holden to grant any charter for infefting the adjudger till such time as he be payed and satisfied of the year's rent of the lands and others adjudged in the same manner as in comprisings, and declares that in all cases adjudications shall be in the like condition with comprisings as to superiours."

(1) By the Scottish Act of 1747 (20 Geo. 2, c. 50), for regulating the casualty of non-entry, &c., it was asserted: "Sect. 12. Whereas the methods of procuring entry by heirs or singular successors or purchasers of lands in Scotland that are held of subject superiors heretofore practised are tedious and expensive Be it therefore enacted by the authority aforesaid That from and after the said twenty-fifth day of March it shall and may be lawful and competent for any person who shall be duly served and retoured heir to any of his predecessors in any lands or heritages in Scotland and to any person who shall purchase or acquire such lands or heritages from the former proprietor or vassal who was duly vested and seized therein and who shall obtain from such vendor or former proprietor a disposition or conveyance containing a procuratory of resignation in favour of such purchaser or disponee to apply to the Ordinary on the Bills in the Court of Session for the time being praying a warrant for Letters of Horning to charge the superior of whom such lands or heritages were respectively held to receive or grant new infeftment to such heir or purchaser respectively; and upon production to the Lords of Session of a special retour of the petitioner or party so applying in any such lands or heritages, or upon production of a disposition or conveyance bearing a procuratory of resignation in favour of such petitioner it shall and may be lawful for the said Lords of Session and they are hereby authorized and required to grant warrant for Letters of Horning upon fifteen days to charge the superior or superiors in the lands contained in such special retour or procuratory of resignation to receive or grant new infeftment to such heir purchaser or disponee respectively."

Sect. 13 enacted that no superior shall be obliged to give obedience to such charge unless the charger at the same time shall pay or tender to him such fees or casualties as he is by law entitled to receive upon the entry of such heir or purchaser, and that it shall and may be lawful for every such superior to shew cause why he ought not to be compelled to give obedience to such charge by offering a bill of suspension in the usual manner to the Court of Session.

By the Act of 1847 (10 & 11 Vict. c. 48) a superior might have been compelled to grant entries by confirmation; and by the Conveyancing and Land Transfer Act, 1874 (37 & 38 Vict. c. 94), infeftment in the land was to imply entry with the superior.

(2) 5 R. 510.

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in the Act of 1469 meant precisely the same thing as a year's free rent of the lands entered by the vassal. The superior takes nothing new by the Act of 1469 or succeeding Acts: they are restrictions of his right; before the Acts where the lands were in non-entry the superior was not bound to enter a singular successor at all; but the Acts bound him to receive as above on payment of a year's rent. When the lands are in non-entry the superior is presumed to be in possession, and what the singular successor must render for his entry is the value of the beneficial enjoyment or year's income of the lands for which it is the equivalent. Minerals are as much the estate held by the vassal as is the surface land, and the one is in non-entry as much as the other; it so happens that in the present case the two are held on the same title by one vassal, but it frequently occurs that the mineral estate of certain lands is held on a different title by a different person from him who holds the surface. It cannot be denied that in such a case both vassals are liable to payment of feu duty, and it would seem to be anomalous that though liable for feu duty the vassal in the minerals should not be liable to a casualty or composition in respect of the same minerals. By the Act of 1469 the superior was to get a year's maill as the land is set for the time. Then see Ersk. Inst. 2, 7, 7; Bankton, Inst. 2, 4, 11; 2, 4, 33; 2, 4, 35; 3, 10, 19; Stair, 2, 4, 32; Menzies' Conveyancing, 3rd ed. pp. 525, 815; Bell's Lectures, 3rd ed. pp. 634, 1136, 1147. Bankton and Erskine wrote shortly after the statute of 1747; the result of all the text-books is that the Act of 1747 referred back to that of 1469.

Allan's Case (1) has been accepted as settling the question whether mineral rents are to be included in the computation of a casualty. In that case the judges said there was no established practice; therefore the practice the respondent relies on must have arisen since then. In some earlier cases, such as *Wellwood* v. *Wellwood* (2), the Court had started the principle of taking an average of back years; but when the Court tried to forecast the years and take an average of future years the Court held the view that the principle of taking past and

(1) 5 R. 510. (2) (1848) 10 D. 1480.

future years was not the right principle: *Lord Belhaven and Stenton.* (1) The old cases relied on by the respondent, *Magistrates of Inverness* v. *Duff* (salmon fishing) (2); *Aitchison* v. *Hopkirk* (house vassal built) (3); *Thomson* v. *Simson* (4), so far as shewing that the practice was to be taken into account, do not apply. As to *Aitchison* v. *Hopkirk* (3) see the next case, *Brisbane* v. *Lord Sempill.* (5) The appellant's proposition is that the superior takes what the vassal can get in the year of infeftment—here the year 1894–5; the contention against the appellant is that the mineral field in question is a mineral field nearly exhausted, and the respondent says that the capital value ought to be taken at 5000*l.*, and the superior should receive 4 per cent. on that or a less sum; but that would not be the casualty the superior is entitled to by law.

[They also cited *Cockburn-Ross* v. *Heriot's Hospital.* (6)]

A. Graham Murray, L.A. (with him *Dundas, K.C.*), (of the Scottish Bar), for the respondent. On the cross-appeal the respondent contends that *Allan's Case* (7) was wrongly decided. The casualty should not have included minerals at all. On the main question the Act of 1469 was strictly confined to apprising creditors. That is, where creditors took the vassal's land the superior was obliged to enter the creditor: Erskine, Inst. 2, 12; 1, 2. The Acts of 1469, 1621, 1669, and 1681 were in early times not regarded as so closely related that they must be read together. Each Act was construed by itself. The words "Such fees or casualties as he is by law entitled to receive upon entry of such heir or purchaser" in the Act of 1747 (20 Geo. 2, c. 50) do not fall to be read as if they incorporated the words of the Acts of 1469 and 1669, which fixed the liability of apprisers and adjudgers, but have reference to such fees or casualties which prior to the Act had been settled by custom or practice as the measure of the voluntary disponees' liability. That is what had been done by the Courts; and the respondent

(1) (1896) 23 R. 423.
(2) (1771) Mor. Dict. 9300.
(3) (1775) Mor. Dict. 15060.
(4) (1825) 4 S. (1st ed.) 224; (2nd ed.) 226.
(5) (1794) Mor. Dict. 15061.
(6) (June 6, 1815) 18 Fac. Coll. 393; 2 Bli. 707; 6 Pat. App. 640; House of Lords Printed Papers, July 24, 1820.
(7) 5 R. 510.

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maintains that the Courts had from the earliest times held that an equitable modification of the Act was the fair course to pursue—that is, from the earliest times the Court has taken on itself to explain what was meant by "a year's maill": Stair's Inst. 2, 4, 32; Erskine, Inst. 2, 12, 24. What the judges thought they ought to look at was not the whole rent, but what was the value of the subject to the person going in: *Paterson* v. *Murray* (1); *Campbell* v. *Hamilton or Westenra* (2); *Hill* v. *Caledonian Ry. Co.* (3) Soon after the Act of 1747 came the case of *Aitchison* v. *Hopkirk* (4) in 1775, when the Court considered reports relative to the previous practice: see also *Thomson* v. *Simson.* (5) Here there is an exhausted coal estate, and what the Lord Ordinary has done is equitable. In salmon fishing an average was taken: *Magistrates of Inverness* v. *Duff.* (6) Then we come to the first case which recognised the superior's right to have the rental of minerals included in fixing the casualty: *Allan's Case* (7) in 1878. That case proceeded on the ground that under entail settlement cases minerals had been held as part of the rents and not as part of the corpus. As to the principles derived from the Entail Act, see *Earl of Breadalbane* v. *Jamieson* (8); *Campbell* v. *Wardlaw.* (9) *Allan's Case* (7) does not govern this case, and ought not to in face of the fact that the whole current of decisions after the Act of 1747 was not what was the rent received, but what was the subject entered worth to the vassal; and here that value has been found by the Court below, and their finding ought to be affirmed.

Scott Dickson, S.-G., in reply.

The House took time for consideration.

1903. May 25. EARL OF HALSBURY L.C. My Lords, I have had an opportunity of considering the judgment prepared by my noble and learned friend Lord Robertson, and I feel I

(1) (1637) Mor. Dict. 15055.
(2) (1832) 10 S. 734.
(3) (1877) 5 R. 386.
(4) Mor. Dict. 15060.
(5) 4 S. (1st ed.) 224; (2nd ed.) 226.
(6) Mor. Dict. 9300.
(7) 5 R. 510.
(8) (1877) 4 R. 667.
(9) 8 App. Cas. 641.

could certainly add nothing to the cogency of the reasoning or the precision with which that reasoning is stated. I therefore content myself with saying that I entirely agree with the judgment which my noble and learned friend has prepared.

LORD SHAND. My Lords, the learned and anxious opinions of the judges of the Court of Session, and the examination of the statutes and authorities which have thus been considered, have been of great assistance to your Lordships in dealing with the arguments in the important questions raised by this appeal, and at the close of the debate I proposed in my judgment also to enter fully on the consideration of the nature and extent of the superior's right to the casualty to be paid to him on the entry of a singular successor.

Under the statutes of 1469 and 1669, relating to apprisings and adjudications respectively, and having regard to the terms of the statute of 1747, in which the language of the opening words of s. 12 is so important, I am satisfied (1.) that the right extends to a year's rent or maill "as the land is set for the time," (2.) that this rent or maill includes mineral rents where coal or other mineral is being worked, and (3.) that the actual rent payable on the year of entry, including the return for minerals, where these, although not let, are worked by the vassal himself, is the measure of the superior's right.

An opportunity has been given to me of reading and considering the terms of the judgment of my noble and learned friend Lord Robertson to that effect, in which his Lordship has fully given his reasons for coming to that conclusion; and as my judgment would only proceed on the same grounds, I refrain from saying more than that I entirely concur in the judgment his Lordship is about to give.

I have only to add that I think the case of *Belhaven* (1), in which his Lordship, as Lord President, gave the leading judgment, is a strong authority on the points that a coal rent is to be included in the rent for the year, and that the actual rent for the year, and not an estimate made on an average of years, or a percentage based on the value of minerals worked

(1) 23 R. 423.

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and still remaining, is the proper measure of the year's rent or maill to which the superior is entitled; and that I think the terms of the Aberdeen Act do not in substance vary from the language of the statutes which apply to the present case.

LORD DAVEY. My Lords, if I thought that a settled construction of the Acts of 1469, 1669, and 1747 had been adopted by the Scottish Courts in accordance with the views expressed by the learned judges who formed the majority of the Court in the present case, I should have followed that construction without hesitation, although it might not have commended itself to my judgment if the matter had to be considered de novo. I have, however, carefully examined all the cases which have been referred to; and, without pretending to reconcile them all with each other, I do not think that the general effect of them is favourable to the argument of the respondent.

If I understand the views expressed by Lord Kinnear correctly, he seems to be of opinion that prior to the Act of George II. there was no composition which the superior was by law entitled to receive on entry of a singular successor, and no legal limit to the amount which the superior might demand, but the payment of a year's rent was a matter of practice and usage only, based on the analogy of the Acts relating to apprisers and adjudication, and being a matter of practice and usage only, the Court was at liberty to modify, and did modify, the words of the earlier statutes according to its ideas of what might be equitable in any particular case.

My Lords, I do not so construe the Act of George II., and I think the learned judge has overlooked the effect of the preamble to s. 12 of the Act. It is there recited that "the methods of procuring entry . . . . by singular successors or purchasers . . . . theretofore practised was tedious and expensive." It appears that prior to the Act a practice had grown up whereby a disponee might, by a fictitious adjudication, compel the superior to receive a year's rent only, and superiors therefore did ordinarily enter disponees upon payment of a composition of that amount without putting them to the

circuit and expense of an adjudication: Bankton, Tit. IV. I understand that it was this method of procuring entry by means of a fictitious adjudication that was described as tedious and expensive in s. 12 of the Act of George II., and that the fee or casualty which the superior was by law entitled to receive, referred to in s. 13, is a year's maill as the land is set for the time, or, as it is called in the Act of 1669, "the year's rent of the lands and others adjudged." Now wherever and so far as a payment or the conditions on the exercise of a right are determined by statute, there is no room for equitable considerations in applying it, and where the majority of the learned judges seem to me to have been led astray is in seeking something which they call the constant annual value of the lands, arrived at by what they conceived to be equitable consideration instead of the year's maills or rent appointed by the statute to be paid.

I proceed now to examine some of the cases cited in order to ascertain the principles upon which the year's maill or rent has been arrived at. One of the earliest and most important cases is that of *Monktoun* v. *Yester*. (1) It was there held that where the representative of a vassal who has sub-feued charged the superior to infeft him, the superior was obliged to do so on receipt of the feu duty due by the sub-vassal, and not the whole rent or annual value of the lands. This was followed in *Cowan* v. *Elphinston* (2) and *Cockburn-Ross* v. *Heriot's Hospital*. (3) The judgment in the latter case was brought by appeal to this House, and affirmed by Lord Eldon. (4) The importance of these cases is, first, that they affirm that a feu is within the expression "as the lands are set"; and, secondly, they affirm that what the superior is to get for this composition are only the fruits for the year which the vassal himself would be entitled to, notwithstanding that the lands may have been covered with buildings producing a vastly higher rent to the sub-feuar—or, in other words, that the superior stands in the place of the vassal as regards the maills or rent for the year for better or for worse. As was said in *Cowan* v. *Elphinston* (2),

(1) (1634) Mor. Dict. 15020.
(2) (1636) Mor. Dict. 15055.
(3) 18 Fac. Coll. 393.
(4) 2 Bli. 707; 6 Pat. App. 640.

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"the Lords found the charger could pay no more to the superior, but a year's duty of that which he was to get himself when entered."

The next step in the construction of the statutes was the mode in which the case, where the charger was himself in occupation of the lands which were not set, should be dealt with. The case at first sight seems not to be within the literal terms of the statute. But on the one hand the lord could not be deprived of his composition because the charger was in possession; and, on the other hand, the latter could not be deprived of his right to be infeft. It was therefore decided that the superior was entitled to the rent which the lands would produce if let. In *Blantyre* v. *Dunn* (1) Lord Curriehill said: "According to the established construction of this enactment the measure of the composition payable by such an entering vassal is the rent payable to him by his tenant in the lands at the time of entry if they be then set in lease to a tenant, or the sum for which they might then be let if they are in possession of the vassal himself." And in *Stewart* v. *Bulloch* (2) this was extended to shootings not then let, and it was held those shooting rents must be taken into account as well as agricultural rent. I observe, in reference to an argument addressed to us, that shooting rents, like mineral rents, were probably unknown in the year 1469. It may be said that this decision was based on the equity or analogy of the statute. If so, it was a very plain equity; but I should prefer to say that the year's maill is the principal subject, and the words "as the land is set for the time" are explanatory or exegetical, and as the superior, if in possession, could have let the land or shootings (not being already in lease) the rent which might have been obtained is, properly speaking, the year's rent.

I pass over the numerous cases in which the question has been discussed what deductions should be allowed to the entering vassal in arriving at the year's rent payable to the superior. These are matters of detail which do not affect the broad principle, and matters, I will add, on which the

(1) (1858) 20 D. 1188. (2) 8 R. 381.

Court might properly pay regard to any established practice or usage. The only cases that we were referred to as justifying the principle of averaging, or what is called an equitable modification of the words of the statute, prior to the *Duke of Hamilton* v. *Allan* (1), are the cases of *Paterson* v. *Murray* (2), *Magistrates of Inverness* v. *Duff* (3), and *Campbell* v. *Hamilton or Westenra.* (4) The first case was that of an appriser, and, the debt being small, the Lords modified the year's rent proportionally. This cannot, in my opinion, be seriously treated as a decision on the construction of the statute. In the second case the principal question discussed was whether, under the provisions of the charter, the defenders, who were singular successors, were liable in a year's rent or in double the feu duty. But there was a subordinate question whether, in computing certain salmon fishings, the period of seven years, which the Lord Ordinary had fixed, was too short. It did not appear under what circumstances the Lord Ordinary had fixed that period, or whether the salmon fishings were in lease or in possession. It may have been a method for fixing the rent at which they might be let. In the third case the Court allowed interest on a grassum or fine which had been previously received by the vassal on granting a sub-feu at a small feu duty. I do not pretend to explain the case or reconcile it with the terms of the statute.

The Lord Advocate, for the respondent, informed your Lordships that he intended to dispute the decision in *Duke of Hamilton* v. *Allan* (1), and contend that mineral rents were not to be taken into account in determining the amount of the composition. But he did not direct much argument to this point, and his argument was chiefly directed to justifying the mode in which the composition had been arrived at by the Lord Ordinary and the majority of the judges in the Inner House. It may be that his criticism on one of the arguments put forward in *Allan's Case* (1), which was based on the right of the superior in case he had to take possession for non-entry, was sound. But I am not sure that this is so, because the

(1) 5 R. 510.
(2) Mor. Dict. 15055.
(3) Mor. Dict. 9300.
(4) 10 S. 734.

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singular successor frequently waits until the death of the vassal, who has disponed the lands to him when the lands are in non-entry, and it may well be that the Legislature, in fixing one year's rent as the composition, may have had in mind what would be the right of the superior in a case of non-entry, and intended to limit it to one year. But however this may be, I have no doubt in my own mind that the mineral rent on open mines ought to be taken into account in ascertaining the right of the superior, and that the principal point in *Duke of Hamilton* v. *Allan* (1) was rightly decided, and I am satisfied with the reasons for their opinion given by the learned judges in that case.

My Lords, I also agree with the opinion of the three learned judges who formed the minority in the Inner House, that the composition must include the mineral rents received by the respondent in the year of entry, subject to proper deductions, as to which there was no dispute before us. I think that this follows from the principle which I have deduced from the words of the statute as interpreted by the Scottish Courts—namely, that the superior is entitled to the year's fruits which the vassal himself receives, or is entitled to receive, in the year of entry. The superior is confined to this when it is to his disadvantage, as in the case of a sub-feu, and he is entitled to the benefit of the principle when it is in his favour. If this be the principle, the question arises, What is the year's rent in the hands of the vassal? It is on this point that the decisions on the rights of limited owners of settled estates and on the Aberdeen Act are important. I find it established in the law of Scotland that the mineral rents and royalties of open mines are yearly rent in the hands of the mine owner, and may be received and retained as such by the life renter in competition with the owner of the fee, or may be assigned as provision for a widow under the Aberdeen Act. If, then, the superior's right is to stand in the place of the vassal for the year in question, he is entitled to whatever the vassal might have received and retained under the name of rent.

My Lords, I have thought it right to state the reasoning

(1) 5 R. 510.

which has led me to this opinion on account of the importance of the case and the division of opinion in the Inner House. Otherwise I might have contented myself with saying that I adopt the very full and carefully reasoned judgment of the Lord President. His Lordship says: "What appears to me to be a fatal objection to the course proposed by the Lord Ordinary is that such a percentage as would be given to the superior under it, would not be in any sense a maill or rent of the lands including the minerals for any year, or even for any average of years." I agree.

I am, therefore, of opinion that on the first appeal of Lord Home the interlocutor appealed from should be reversed, and instead thereof the interlocutor of the Lord Ordinary should be recalled, and it should be ordered that the pursuer is entitled by way of composition to the full amount of the rents and royalties which accrued due in the year from Whitsunday, 1894, to Whitsunday, 1895, subject to all proper deductions. If the amount is admitted it should be stated in the order. And the respondent should pay the costs here and below. The cross-appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, the right of a superior to a composition from a singular successor demanding an entry in that character was given by the Act 20 Geo. 2, c. 50. Although under the modern statutes the respondent is held to be already entered, his liability to the superior is still that stated in the Act of George II. Now, what the superior is declared entitled to by the Act of 1747 is "such fees or casualties as he is by law entitled to receive upon the entry of such purchaser." The first question in the present appeal is to what fees or casualties was a superior in 1747 entitled upon the entry of a singular successor. A great amount of learning and research has been bestowed upon sources of information external to the statute; but I think that the statute contains within itself an infallible clue to the answer. The opening words of the 12th section (which have not been referred to in any of the opinions of the majority of the Court of Session) are as follows: "And whereas the methods of procuring entry by heirs or

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singular successors or purchasers of lands in Scotland, that are held of subject superiors, heretofore practised, are tedious and expensive"—and then follows the new mode, namely, to charge the superior by letters of horning. The preamble of the section therefore asserts that singular successors were not without methods of procuring entry, but describes those methods as tedious and expensive. What the statute goes on to do is to provide an expeditious and cheap way of procuring entry, and then it says in s. 13 that the superior is to get the same fees or casualties as he is by law entitled to receive. I should have thought, and I think, it perfectly plain that this means that he is to get the same fees and casualties under the new and simple system as he would have got under the old and roundabout system. All the change that is made is in the procedure.

Now, when it is further inquired what were the tedious and expensive methods, the answer is easy: the singular successor was collusively made a creditor of his seller, and in that character forced an entry as an appriser or adjudger. To use the language of Lord Low, one of the majority in the Court below, "the form of apprising or adjudging the lands for a price was gone through and the superior was thereby compelled to receive the disponee upon payment of a year's rent under the old Acts." Those old Acts are 1469, c. 36, about apprisings, and 1669, c. 18, about adjudications. What the creditor had to pay under each was the same, namely, a year's rent; and the words of the latter of those two Acts are peculiarly clear and forcible in expressing this identity. It asserts that "by several Acts of Parliament and constant practick of the kingdom there is one year's rent of all lands, annual rents and others apprised, due and payable to the superior of the said lands and others," and that "there is the same reason in cases of adjudications as apprisings"; and then it goes on to enact that superiors "shall not be holden to grant any charter for infefting the adjudger till such time as he be paid and satisfied of the year's rent of the lands and others adjudged in the same manner as in comprisings"; and it ends by declaring "that in all cases adjudications shall be

in the same conditions with comprisings as to superiors." It seems to me, therefore, to be past all doubt that the words of the Act of 1469 are the ultimate criterion of the rights of singular successors, adjudgers, and apprisers equally.

That this is the true explanation of the Act of 1747 is, I think, conclusively proved by the authority of Bankton, whose Institute was published four years after the Act of 1747. In the four passages to which we were referred, he expounds the statute in a sense which admits of no dubiety whatever, and wholly excludes the idea that the Act, when it spoke of what superiors were by law entitled to receive, meant what they would be entitled to receive if they and the vassals agreed to it.

The conclusion to which I come, then, is that the statute of 1747 has by direct enactment made the formula of 1469 the measure of the superior's rights for the entry of singular successors—"a year's maill as the land is set for the time" —and the Act of 1669 uses the word rent as equivalent to maill.

Lord Kinnear, in his very elaborate opinion, does not refer to Bankton, nor does he discuss the 12th section of the Act of 1747, which states the existing right of a singular successor to procure an entry by a tedious and expensive method. His Lordship's statement that "the only law which entitled" the superior "to a fee on the entry of a voluntary disponee was that which rested on established usage, because the earlier statutes do not apply to the case" can only be supported if we read "voluntary disponees" with the addition which is made in an earlier sentence—"presenting themselves to the superior, as such." But then what Bankton says, and what I think the Act of 1747 itself plainly implies, is that before that Act the obligation of the superior to enter and his right to a casualty on entering arose when the "voluntary disponee" presented himself, not "as such," but as an adjudging or apprising creditor.

In holding that the superior's right to a composition on the entry of a singular successor is measured by the language of

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the Act of 1469, I do so with the more confidence that this has been taken for granted by our highest judicial authorities, and as far as I know was never questioned until this decision. I am content to cite two proofs of this prevalent opinion which will hardly be called in question. "It is not disputed," says Lord President Inglis, in *Stewart* v. *Bulloch* (1), "that the superior's right to a composition depends entirely on the old statute 1469, c. 36, and what he is entitled to require in name of composition is, in the words of the statute, 'a year's maill as the land is set for the time.'" Again, Lord Rutherfurd-Clark (in the same case) said: "The composition payable by a singular successor is a year's rent, or, to use the words of the Act 1469, c. 36, a year's maill as the land is set for the time."

In support of the conflicting theory that the Act of 1747 appeals not to the earlier statutes but to practice, reference has been made to a number of decisions where practice has been considered. As to these, however, it is necessary to distinguish. Even if, as I think is the case, the rule is to be found in the statute, there are many instances in which practice may be legitimately inquired into, in the application of the rule, or, as the Lord President says, for "clearing a point on which the statute was silent." But, as this question recurs on another branch of the case, I reserve for it a brief analysis of the decisions referred to.

Holding, then, the measure of the superior's right to be a year's maill as the land is set for the time, I proceed to consider the two questions which arise: (1.) Does the rent or do the royalties payable by the tenant under a mineral lease form part of the year's maill at all; and, (2.) if so, is what is actually paid by the tenant to be charged, or is some other sum to be stated on the principle of the judgment appealed against?

1. On the first and more general question I think that the superior is entitled to hold the produce of minerals to be part of the year's rent. The considerations pointing in an opposite

(1) 8 R. 381.

direction are too familiar to require repetition. They have been in full view of the Courts and of Parliament during the long course of decision and of legislation which is deduced in the judgment of the Lord President. Setting on one side for the moment the fact that for twenty-five years the matter directly in hand has been held as settled in Scotland, the annual yield of minerals has in many other relations for long been held and treated as income. Nor do I think it immaterial to observe that, where lands were in non-entry, a superior did in fact enjoy the produce of the minerals. I am aware that Lord Kinnear has anxiously protested against the use of this argument which was made in the case of *Allan* (1); and I think he has hit a blot in some of the opinions. But, although in the case then in hand the fee may have been full, and therefore that superior had not the remedy against that vassal, yet I hope I shall escape a charge of feudal heresy if I say that the ultimate right of the superior when the lands come to be in non-entry is not irrelevant in considering whether the Legislature must not be taken in 1747 to have intended the superior to have a year of the whole yield of the estate, as it was in fact coming in. On the whole matter I think that the House does well to support the decision in *Allan* (1) on the general question, and to dismiss the cross-appeal.

2. If, then, coal is to be taken into account in fixing the composition due, the reasoning which supports that conclusion seems to lead straight to the result that what the vassal drew from his tenant in the year of the entry is the amount due. The theory of the majority is certainly a most singular one, and has no relation at all to the rule of the Act 1469. I observe that the learned judges who form the majority say very little in its favour; and, when it is examined, it turns out to be unsupported either by principle or by authority. On the face of it it offers no formula which even pretends to square with the case in hand; and if proposed as a general rule it breaks down at every step. I do not dwell on this, for it is sufficiently discussed by the Lord President; and the appellant

(1) 5 R. 510.

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has pointed out with justice that if it be applied to large coalfields with a long expectation of life the results are astounding.

Where the Lord Ordinary got this formula does not very clearly appear—certainly not in *Sivright* (1), which is the only authority offered in its support, for there, as pointed out by Lord Adam, the basis of capitalisation was the average of three previous rents, and here it is an estimate of the remaining minerals. But if it be said that at least the principle of capitalisation was settled in *Sivright* (1), then I must take leave to point out that *Sivright* (1) is in that respect a most unsatisfactory decision. Capitalisation had never been affirmed by any previous decision, and yet in *Sivright* (1) it was so completely taken for granted that counsel were not called on to argue in support of it. And how lightly the Second Division sat to the principle of capitalisation, once they had adopted it, is shewn by the next case, *Sturrock* (2), where the year's rent was followed.

The only justification for such arbitrary proceedings must be found in the theory, never consciously adopted, that the Court sat as arbitrators free from any statutory rule. Now, first of all, I think, for the reasons already given, that there is such a statutory rule; but, second, an examination of the decisions relied on by the respondent shews what slender ground there is for saying that the Court of Session has disregarded that rule and looked to practice as the standard. In some cases the matter was not judicially decided at all; in some the matter was clearly, and in others arguably, undetermined by the terms of the statute, and therefore legitimately admitted of exposition by custom. The total number of cases is inconsiderable.

The first case mentioned by Lord Kinnear is that of the Inverness salmon fishings and grass lands (3), and his Lordship says that it was there "held" that salmon fishings and grass lands must be estimated at the medium rent for a period of

(1) 6 R. 1208.
(2) 7 R. 799.
(3) *Magistrates of Inverness* v. *Duff*, Mor. Dict. 9300.

years. But the report in Morrison shews that it was only by concession that an average of seven years was adopted, the contested question being between seven years and twenty, and the pursuers, who proposed seven, saying that this "was an indulgence, the current rent being the standard." The same explanation applies to the case of *Campbell* v. *Hamilton or Westenra* (1), cited by the respondent. It was not the Court that decided, but the vassal who conceded, that interest on a grassum should be included in the composition, this being done to parry a demand for a year's rent. As regards the two teind cases, it is obvious that the question then decided on practice was one unprovided for in the statute, and, although it might have been decided apart from practice, yet the practice was no doubt instructive. But in these cases, as in the others cited, and particularly in Aitchison, I fail to find any ascription to custom alone, as opposed to the Act 1469, of the authority to settle the composition of the superior—the question was never raised. They are treated, rightly or wrongly in each instance, as cases where, to use the Lord President's phrase, practice would "clear a point on which the statute was silent." The remaining cases may be briefly noticed. If *Paterson* v. *Murray* (2) be rightly reported, no principle maintained even by the respondent can support it; for, in a case of land pure and simple, the Lords modified the composition to 300 marks, "albeit the lands were worth 800 marks at least"; and this was the case of a compriser, and therefore directly within the terms of the Act 1469. The case, however, has its own lesson, for it, like the very much more recent case of *Wardlaw* (3), shews that in some instances the Court of Session have, even when administering unambiguous statutes, adopted modifications of the statutory rule, which cannot be reconciled with the authority of statute law. It may be permissible to add that in Scottish jurisprudence there was in former days less attention paid than now to the terms of the statute being administered, and more to opinion, whether expressed in books or in practice.

(1) 10 S. 734. (2) Mor. Dict. 15055.
(3) 8 App. Cas. 641.

H. L. (Sc.) 1903 EARL OF HOME v. LORD BELHAVEN AND STENTON. Lord Robertson.

The decision of *Cockburn-Ross* (1), which was affirmed by your Lordships' House, seems to me in no way to help the respondent's case, for the superior there was given all that the vassal drew, namely, the feu duty.

On these grounds I am unable to adopt the conclusion of the majority of the seven judges. I think that coals are within the Act of 1747, and are to be taken into account in fixing the composition, that they must therefore follow the rule of the Act of 1469, and that the royalties paid in the year of entry are accordingly due. They are, just as much as fixed rent, the sum fixed on as the landlord's share of profits, and therefore rent. I consider the mode of calculation adopted in the Court of Session to be contrary to the statute, and unsupported either by reason or authority.

Ordered and adjudged, that the said interlocutors in part complained of in the said original appeal be, and the same are hereby, reversed; and it is hereby declared that the appellant (pursuer), the said Right Honourable Charles Alexander, Earl of Home, Baron Douglas of Douglas, &c., K.T., is entitled, by way of composition, to the full amount of the rents and royalties which accrued due in the year from Whitsunday, 1894, *to Whitsunday,* 1895, *with interest as from the* 20*th day of July,* 1898, *subject to all proper deductions: And it is further ordered, that the said cross-appeal be, and the same is hereby, dismissed this House: And it is further ordered, that the said cause be, and the same is hereby, remitted to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and judgment: And it is further ordered, that the respondent*

(1) 18 Fac. Coll. 393; 2 Bli. 707; 6 Pat. App. 640; House of Lords Printed Papers, July 24, 1820.

(defender), the said Right Honourable Alexander Charles Hamilton, Lord Belhaven and Stenton, do pay, or cause to be paid, to the said appellant the costs of the action in the Court of Session, and also the costs incurred in respect of the said appeals to this House, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments.

Lords' Journals, May 25, 1903.

Agent for appellant: *John Kennedy, W.S., for Strathern & Blair, W.S., Edinburgh.*

Agents for respondent: *Grahames, Currey & Spens, for Dundas & Wilson, C.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1903 March 25; May 1.

JACKSON . . . . . APPELLANT;

AND

COMMISSIONER OF STAMPS . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

New Zealand Deceased Persons' Estates Duties Acts of 1881, *s.* 36; *of* 1885, *s.* 18—*Liability to Duty—Residuary Estate taken under Appointment empowered by the Will.*

Held, that, under New Zealand Deceased Persons' Estates Duties Acts of 1881, s. 36, and the amending Act of 1885, s. 18, a widow who takes her husband's estate by her own appointment under his will takes an estate upon which the duty payable under the Act is a charge imposed as from the date of the death, and cannot claim the exemption to which she would have been entitled had she acquired the estate directly under the will.

APPEAL from a judgment of the Supreme Court (May 16, 1901) affirming an assessment of the Commissioner of Stamps, made under the Deceased Persons' Estates Duties Acts of 1881 and 1885, of the duty payable upon the estate of William Valentine Jackson.

The question was whether the appellant was, under the circumstances stated in their Lordships' judgment, absolutely entitled under her husband's will to his residuary estate so as to entitle her to exemption from duty in respect thereof.

The Commissioner decided in the negative; and the Supreme Court on a case stated affirmed this decision, holding that the assessment of duty must be made solely on the state of facts existing at the testator's death, without regard to any subsequent alteration therein effected by the appellant's exercise of a power conferred by the will.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD LINDLEY, and SIR ARTHUR WILSON.

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Vaughan Hawkins, for the appellant, contended that, for the purpose of ascertaining how much of the testator's property devolved under his will upon the appellant, the state of facts existing at the time of the assessment might be regarded. The Court was not limited in its view to the state of facts existing at the date of the death, and ought to have held that the appellant took under the will, and became absolutely entitled thereunder and in pursuance of its directions to the residuary estate, which was therefore exempted from duty. A person who takes under a power of appointment contained in a will takes under that will: see *Attorney-General* v. *Mitchell* (1); *Attorney-General* v. *Chapman* (2); Farwell on Powers, p. 279, and cases there cited.

Haldane, *K.C.*, and *Northcote*, for the respondent, were not heard.

1903
May 1.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The late appellant, who was the widow and executrix of William Valentine Jackson, and is now deceased, brought this appeal by special leave against a judgment of the Supreme Court of New Zealand without having appealed to the Court of Appeal in the Colony. The appeal has now been duly revived by the legal personal representative of the widow.

The question arises out of a claim by the widow to exemption from the duties payable under the Deceased Persons' Estates Duties Act, 1881, and the amending Act of 1885, in respect of her husband's residuary estate, on the ground that she became, as she contended, absolutely entitled thereto under his will.

Under the will the testator's widow took a life interest in the testator's residuary estate. Subject to her life interest, the residuary estate was to be held in trust for such person or persons at such ages and times, not being earlier as to any object of that power than his or her age of twenty-one years or day of marriage, in such shares and manner as she should by deed or will appoint. In default of appointment, there was

(1) (1881) 6 Q. B. D. 548. (2) [1891] 2 Q. B. 526.

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an ultimate bequest upon trust for certain persons and purposes therein mentioned.

The testator died on February 13, 1900, and his will was duly proved by the widow shortly afterwards.

On March 19, 1900, the widow appointed the whole of the testator's residuary estate, subject to her own life interest therein, to herself absolutely. Thereupon she claimed the benefit of a provision in the Act of 1881, as amended by the Act of 1885, which declares that "no duty shall be payable in respect of any real or personal property to which any wife . . . . shall become absolutely entitled . . . . under" her husband's "will."

The Commissioner of Stamps decided that, upon the true construction of the will and the relevant section of the Act of 1885, the widow did not become absolutely entitled under her husband's will to the trust fund in question, and declined to allow any exemption from duty in respect thereof.

A case was then stated by way of appeal for the consideration of the Supreme Court. The case was heard by Edwards J., who dismissed the appeal and affirmed the Commissioner's decision.

The general scheme of the Act of 1881, as amended by the Act of 1885, is clear and simple.

"In order to ascertain the amount of duty payable" under the Act every "administrator"—a term which includes an executor to whom probate has been granted—is bound within six months from the grant to file with the Commissioner a statement in writing in respect of the property to which the administration relates specifying (*a*) the particulars of all the personal property of or to which the deceased was possessed or entitled at the time of his death and of the value thereof; (*b*) the debts due by the deceased payable thereout; and (*c*) the balance of such personal property after deducting such debts. A similar statement is required with regard to the testator's real estate.

The statement of the administrator, when finally approved by the Commissioner, receives the Commissioner's certificate.

As regards the payment of duty, the Act of 1881 contains the following provision :—

Sect. 7 : " Except as herein otherwise provided, there shall be paid to the Commissioner by every administrator duty according to the rate mentioned in the schedule to this Act, which shall be computed on the final balance of real and personal property appearing upon his statement as certified as aforesaid, and shall be assessed by the Commissioner."

The exceptions referred to in s. 7 of the Act of 1881 included a provision in s. 36 exempting a widow from duty in respect of any real or personal property to which she became absolutely entitled under her husband's intestacy or under his will. That provision was repealed by s. 18 of the Act of 1885, and re-enacted so as to make the exemption extend to a husband taking under his wife's intestacy or under her will.

On a careful review of the Act of 1881, as amended by the Act of 1885, Edwards J. came to the conclusion that the duty payable under the Act was made a charge upon the property of the deceased, and that the liability imposed was imposed as from the date of the death. His opinion, therefore, was that in the present case the subsequent appointment by the widow could only pass the property subject to the incidents which attached to it at the date of the appointment, and therefore subject to liability to pay duty.

Their Lordships agree with Edwards J. in his view of the effect of the enactment. They do not, however, dissent from the view of the Commissioner, who arrived at the same result by a different path. The Commissioner was of opinion that according to the true construction of the statute the widow did not become entitled to the property under the will. The absolute interest which alone confers immunity from duty was certainly acquired under the appointment and not under the will.

The learned counsel for the appellant referred to certain cases under the English Succession Duty Act, and under the English Customs and Inland Revenue Act of 1881. It does not, however, appear to their Lordships that any assistance is to be derived from them. In each of those cases the

J. C. 1903 JACKSON v. COMMISSIONER OF STAMPS.

language and scope of the enactment differed from the language and scope of the enactment now under consideration. Cases relating to the construction of covenants to settle property afford perhaps a better analogy. It has been determined in this country that a person entitled under a will in default of appointment, who takes by appointment precisely the same interest which he would have taken if no appointment had been made, takes a new interest, and takes under the appointment and not under the will. (1)

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed.

The present appellant must pay the costs of the appeal.

Solicitors for appellant: *Lovell, Son & Pitfield.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

(1) *Sweetapple* v. *Horlock*, (1879) 11 Ch. D. 745.

[PRIVY COUNCIL.]

THE COMMISSIONER OF PUBLIC WORKS (CAPE COLONY) . . . . } DEFENDANT;

AND

LOGAN . . . . . PLAINTIFF.

J.C.*
1903
May 20, 21;
June 12.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Cape of Good Hope Act IX. of 1858, *s.* 11—*Construction—Claim to take Lands for Railway Purposes—Compensation.*

It is a sound canon of construction that an intention to take away property without compensation should not be imputed to a legislature unless it be expressed in unequivocal terms.

Western Counties Ry. Co. v. *Windsor and Annapolis Ry. Co.*, (1882) 7 App. Cas. 178, followed.

Where it appeared that road commissioners claimed to expropriate without compensation the respondent's land for railway purposes on the ground that s. 11 of Act IX. of 1858 effected a transfer to them of the rights derived by the Government from the Proclamation of 1813, and extended those rights so as to be applicable to the present case:—

Held, that s. 11 must receive a strict construction. Its language was satisfied by the transfer of the existing powers without any extension thereof. It would require a more direct expression of intention to create such a new power of expropriation for railway purposes without compensation as was claimed.

APPEAL from a decree of the Supreme Court (May 6, 1901), so far as it declared the respondent's right to compensation for land expropriated by the Government.

The issue decided was whether the Commissioner of Public Works, acting on behalf of the Colonial Government, has, by the law of the Cape Colony, the right under the circumstances stated in their Lordships' judgment to expropriate for works and purposes connected with the railways under his control certain unimproved lands belonging to the respondent held by a quit-rent tenure without paying compensation for the same.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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1903
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The respondent's claim to compensation was denied by the appellant on the following grounds. He had derived title to his farm from a grant thereof made to his predecessor on November 1, 1838, by the Cape Government on perpetual quit-rent, and subjecting the land, inter alia, to the liability, without compensation to the proprietor, to have any road made over it for the public good by order of the Government, and to all such duties and regulations as there were already, or should in future be, established respecting lands granted under similar tenure.

The appellant also contended in the Court below, that by virtue of legislation passed in the Colony, both before and after the said grant, "duties and regulations were established" imposing upon the proprietors of land held upon quit-rent tenure the liability to have such land expropriated without compensation by the Colonial Government for all purposes required for the making, repairing and maintaining the Colonial railways or any works in connection therewith. He relied more particularly upon the Proclamation issued in 1813 by Governor Sir J. Cradock for the conversion of lands held upon loan tenure into lands held upon quit-rent tenure, upon the Colonial Acts IX. of 1858 and XIX. of 1874 and the construction which had been placed upon these enactments by the Courts.

The Supreme Court decided in favour of the respondent, declaring him to be entitled to compensation for all the land expropriated. The Court did not decide what parts of the land expropriated were taken for railway purposes, or what, if any, were not. The amount of compensation was left to be awarded by arbitrators in pursuance of the Colonial Act No. 19 of 1874 and the provisions relating thereto.

Lawson Walton, K.C., and *Mackarness*, for the appellant, contended that this decision should be reversed. The land expropriated was unimproved land held upon quit-rent tenure, and was liable by the law of the Colony and the terms on which it was held to be expropriated without compensation for the construction and maintenance of the Colonial railways and of any works in connection therewith. They relied on Sir J.

Cradock's Proclamation, s. 4 of which reserved to the Government from every grant of land on quit-rent tenure "the right of making and repairing public roads and raising materials for that purpose on the premises." This liability had been extended to the additional purposes now in question by Act IX. of 1858, ss. 10 and 11, which provided that the chief commissioner of roads, or any assistant commissioner or any officer appointed by and acting under the authority of the Government, might exercise a similar right as therein defined, merely with the proviso that it must be with previous notice to the proprietor: see *Landmark* v. *Van der Walt.* (1) Then came Act XIX. of 1874, which vested similar powers in any person charged by the Government with the making and repairing of railways or of any works in connection therewith. In the case of *Divisional Council of the Cape Division* v. *De Villiers* (2) it was held that the Crown was not liable to make compensation for the exercise of its rights for the construction and repair of public roads under s. 4 of the Proclamation of 1813. It was contended that the respondent's land was expropriated for railway purposes, and that no compensation was due, or if due was so only for such part as could be shewn not to have been taken for railway purposes, and the appellant had made sufficient tender to satisfy the same. Reference was made to *Webb* v. *Giddy* (3); *Berry* v. *Divisional Council of Port Elizabeth* (4); *Stellenbosch Divisional Council* v. *Myburgh* (5); *Kemp* v. *South Eastern Ry. Co.* (6)

Boxall, K.C., and *Dighton Pollock*, for the respondent, contended that the order of the Court below was right. Under the grant the land was only subject to have roads made over it. Act XIX. of 1874 did not confer on the Government for railway purposes any further or more extensive rights of expropriation than were by Act IX. of 1858 conferred upon road commissioners for making and repairing roads. Accordingly the

(1) (1885) 3 Juta, 300.
(2) (1874) Buch. 50; (1887) 2 App. Cas. 567.
(3) (1878) 3 App. Cas. 908.
(4) 1 Sup. Ct. (Eastern District), 241.
(5) (1887) 5 Juta, 13.
(6) (1872) L. R. 7 Ch. 364.

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Government are not entitled, except for the purposes of making the actual track of the railway and repairing the same, to expropriate and take without compensation the block of quit-rent land in suit. Even if additional powers of expropriation for railway purposes are conferred by Act XIX. of 1874, there was no additional liability imposed upon the owners of quit-rent land. In the absence of such additional liability imposed by statute the quit-rent block of land in suit is liable only to the burdens imposed by Sir John Cradock's Proclamation and by the conditions contained in the deed of grant thereof in 1838. Reference was made to *De Villiers* v. *Cape Divisional Council* (1) and *Slabber* v. *Bell*. (2) Sect. 11 of Act IX. of 1858 did not on its true construction extend the power of taking lands without compensation. On general principles of law and equity proprietary rights cannot be confiscated, unless such confiscation is expressly and in unambiguous terms authorized by the Legislature. The words of s. 11 are satisfied without such construction. The powers conferred upon or transferred to the Government may and ought to be exercised on terms of paying compensation, and there is nothing which expressly authorizes the Government to dispense with its payment. If the Government had the power of taking without compensation it is extraordinary that it was never used. The right claimed is one which is very liable to abuse, especially if railway purposes is an elastic phrase. There ought, therefore, to be a strict construction of the section in question in favour of compensation and against arbitrary confiscation: see Maxwell's Interpretation of Statutes, pp. 401, 411. See also *Hough* v. *Windus* (3), to the effect that a statute should be construed if possible so as to respect vested rights: *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (4) There are several cases also to that effect summarized in *Jordeson* v. *Sutton, &c., Gas Co.* (5) See also *London and North Western Ry. Co.* v. *Evans*. (6)

Mackarness replied.

(1) Buch. 50.
(2) (1861) 4 Searle, 3.
(3) (1884) 12 Q. B. D. 224, 237.
(4) 7 App. Cas. 176, 188.
(5) [1898] 2 Ch. 614, 621.
(6) [1893] 1 Ch. 28.

June 12. The judgment of their Lordships was delivered by

LORD DAVEY. The short question in this appeal is, whether the respondent is entitled to compensation for lands expropriated by the Government of Cape Colony for purposes connected with a railroad constructed by the Government through the respondent's land.

The land in question is part of a farm called De Draai Farm or Kruispad, which was originally granted by the Government to one Schalk Willem Pienaar on perpetual quit rent, and by the deed of grant, which is dated November 1, 1838, the grant is expressed to be made subject to certain conditions therein mentioned and as "being further subject to all such duties and regulations as either are already or shall in future be established respecting lands granted under similar tenure."

It has already been decided by this Board in *Divisional Council of the Cape Division* v. *De Villiers* (1), and it is not disputed, that lands of this tenure are subject to the provisions of the Proclamation of Sir John Francis Cradock of August 6, 1813, for the conversion of loan places to perpetual quit rent. By this Proclamation it was provided that every holder of a loan place, on his making application by memorial to the Government for the purpose, should have a grant of his place on perpetual quit rent to the same extent as he had theretofore legally possessed the same on loan. Sects. 4 and 11 are as follows:—

Sect. 4: "The Government reserves no other rights but those on mines of precious stones, gold, or silver, as also the rights of making and repairing public roads and raising materials for that purpose on the premises; other mines of iron, lead, copper, tin, coals, slate, or limestone are to belong to the proprietor."

Sect. 11: "This perpetual quit rent" (meaning apparently the land held on that tenure) "shall further not be liable to any other burthens but those to which all freehold lands are already subject or which may hereafter be further prescribed."

Under later legislation the powers of the Government in

(1) 2 App. Cas. 567.

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respect of the making of roads were vested partly in road commissioners and partly in Divisional Councils. The provisions of the earlier Ordinances and Acts for this purpose were consolidated in Act IX. of 1858, intituled "An Act to provide for the Management of the Public Roads of the Colony," the material sections of which, for the present purposes, are as follows:—

Sect. 10: "The chief commissioner or any assistant commissioner or any officer duly appointed by the Governor and acting under the authority of the Governor may enter upon and take possession of so much of any land belonging to Her Majesty the Queen as may be required for the purpose of any main road and for the erection of toll-houses, toll-bars, residences for workmen, or for any other purpose relating to the execution of this Act; and they may enter upon all such land lying convenient to a main road, and there dig, get, and carry away any stone, clay, or other materials which may be required or serviceable for making or repairing any main road."

Sect. 11: "For the purpose of making any such main road, and of providing any such toll-houses and residences as aforesaid, and generally for any of the objects of this Act, the aforesaid commissioners of roads, or other officer by them duly authorized, are hereby invested for the purpose of so doing with all and singular the legal rights, if any, belonging to the Government of this Colony in respect to the taking of any land and the raising and carrying away materials for making and repairing public roads, whether such rights have been preserved to the said Government by the Proclamation of His Excellency, Sir John Francis Cradock, bearing date the 6th day of August, 1813, permitting the conversion of lands on loan into places on perpetual quit rent, or have been created by express stipulation or condition in any grant of freehold property, or exist in any other way or manner whatsoever: Provided that no land be taken or materials be raised or carried away as aforesaid without previous notice to the proprietor thereof."

Sect. 12: "If any of the aforesaid commissioners of roads, acting under the authority of the Governor, should require to

take or use any land or to dig, get, or carry away any materials situated as aforesaid, belonging to any person who may not be bound by law to allow the said commissioners so to do without requiring any recompense or payment, and who may think proper to require conpensation from the said commissioner—or if he should require to use any land or to take materials from any land that the Government may have a legal right to use, but which has been improved by cultivation, irrigation, or otherwise—he may treat and agree with every such person for the purchase or hire as the case may be of any such land or materials, and may enter into any contract relative to the obtaining of such land or materials, and for compensation for the use of such improved land, upon such terms and conditions as he shall judge expedient."

And the same section further provided, in case of disagreement between the owner of the land and the commissioner as to the amount of the purchase-money, or hire, or other recompense to be respectively given and accepted, for the same to be settled by arbitration as therein appears.

By s. 3 of Act XIX. of 1874, which provided for the construction (amongst other railways) of a railway from Worcester to Beaufort West, all and singular the powers which were by the Act IX. of 1858 bestowed upon the commissioners of roads in regard to taking or acquiring lands and materials necessary for the making or repairing of any such main road as in the said Act mentioned or of any works in connection therewith, were bestowed upon the Governor or any person charged by him with the making or maintaining the railways precisely as if the said powers and authorities were, mutatis mutandis, therein again set forth, and as if the said railways were public roads.

The railway from Worcester to Beaufort West was constructed partly on lands forming part of the farm now belonging to the respondent, and a station called the Touws River Station was made there. Previously to and in the year 1885 the Government acquired portions of the farm for the purposes connected with the railway, including the building of an hotel, and paid Du Plessis, the then owner of the farm, 350*l.* in

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respect of such expropriation. According to the evidence of Mr. Elliott, the general manager of the Government railways, that sum was paid because of the hotel, which he thought was not quite a railway purpose.

On December 16, 1896, the Government gave notice to the executors of Du Plessis (then deceased) of their intention to expropriate a further portion of the farm in extent 160 acres. The land appears to be required for certain purposes connected with the existing railway other than construction or maintenance thereof. By deed of transfer dated February 24, 1897, the farm was conveyed to the respondent, who thereupon became and is now the registered owner of it. The respondent bought with notice of the notice of December 16, 1896.

Lengthy negotiations thereupon ensued between the Government and the respondent respecting his right to compensation for the land expropriated under the notice of 1896, and respecting certain rights of water. In the result the respondent, on July 25, 1900, commenced the present action against the appellant, and by his declaration he claimed (amongst other things) a declaration that the land claimed to be expropriated since 1885 was not required for railway purposes, and restoration of the same to him with damages. At the trial the other issues were disposed of, and as it appeared that the respondent was quite willing to the expropriation going through provided compensation was paid, the parties agreed that the issue be determined whether the respondent was entitled to compensation in respect of the expropriation.

The Supreme Court gave judgment, dated May 6, 1901, for the respondent, declaring him entitled to compensation for the land expropriated. The reasons for the judgment were stated by the Acting Chief Justice Sir E. J. Buchanan.

It is admitted that the land in question has not been improved by cultivation, irrigation, or otherwise, within the meaning of the 12th section of Act IX. of 1858, and that the appellant's right to expropriate the land without payment of compensation is derived from the Proclamation of 1813, which (as he contends) is extended by the 11th section of that Act to the other purposes mentioned in that section.

The question, therefore, turns exclusively on the proper construction of the 11th section. Does that section mean that the right of taking land and materials for the making and maintenance of roads reserved to the Government as regards quit-rent lands by the Proclamation of 1813 are extended and made applicable to the other purposes mentioned in the section? Or is it only a transfer section whereby the existing powers of the Government tales quales are transferred to and vested in the commissioners? If the former is the true construction, the decision should be in favour of the appellant, for their Lordships think that the power, if extended to taking land for new purposes, must be a power to expropriate without the payment of compensation as reserved by the proclamation. It must be admitted that the language of the section is capable of either construction. In favour of the appellant's construction, it may be argued that the whole section is governed by the opening words "for the purpose of making any such main road and of providing any such toll-houses and residences as aforesaid and generally for any of the objects of this Act." And that the words "for the purpose of so doing" are repeated after the word "invested." On the other hand, if the object was to extend the existing power to new purposes, which is equivalent to the creation of a new power of expropriation, you would expect a much more direct expression of the intention, and it may be pointed out that the section extends to freehold lands as well as quit rent, and the existing powers which had been created by express stipulation or condition or in some other way or manner as regards freeholds, might well be powers which would be sufficient for some or all of the purposes mentioned so as to satisfy the words of the section. Their Lordships are disposed to adopt the narrower construction of the section which would make it a transfer only of the existing powers from the Government to the commissioners as more conformable with the language used. But their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal

J. C. 1903

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terms. This principle has frequently been recognised by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (1)

Their Lordships, therefore, agree with the conclusion of the learned judges in the Supreme Court, though not, perhaps, for quite the same reasons. They are of opinion that the respondent was not bound by law to allow the appellant to take the land for the purposes for which they are required without recompense, and he is therefore entitled to compensation under the 12th section of the Act. They will therefore humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of it.

Solicitors for appellant: *Wilson, Bristows & Carpmael.*
Solicitors for respondent: *Boxall & Boxall.*

(1) 7 App. Cas. 178, at p. 188.

[PRIVY COUNCIL.]

O'KEEFE . . . . . PLAINTIFF;

AND

MALONE . . . . . DEFENDANT.

J. C.*
1903
March 25, 28, 31;
May 13.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Crown Lands Act, 1889, *s.* 33; *of* 1891, *s.* 3—*Non-renewal of Licences gazetted by Mistake—Power of the Minister to reverse the same—Effect of the Reversal.*

The lands in suit had been reappraised in 1899, but the reappraisement was not finally settled till January 19, 1900, and accordingly the fees in respect of the appellant's licences for 1900 had not been paid before the expiration of 1899. By error his lands had been gazetted in September, 1899, as requiring payment of fees at the old rates, and on January 6, 1900, non-renewal of the licences had also been gazetted. The appellant thereupon paid the fees at the old rates on account, and obtained a reversal of the non-renewal.

Thereafter the respondent applied for and obtained annual leases of the same lands; but, *held*, that they were still under licence to the appellant, and therefore not available for lease under s. 33 of the Land Act of 1889.

There had not been under the circumstances default by the appellant, and consequently there was no authority to refuse renewal of his licences. The notice purporting to that effect was a mistake which it was in the power and duty of the Minister to rectify.

Semble, under s. 3 of the Land Act of 1891 the Minister's reversal of the non-renewal had the same effect as if the non-renewal had never been notified or declared.

APPEAL from an order of the Supreme Court (May 1, 1902) making absolute a rule to enter verdict for the defendant with costs in an action for trespass on land claimed by the plaintiff as occupation licensee and preferential occupation licensee under the Crown Lands Acts of 1884 and 1895, and by the defendant as annual lessee under the Crown Lands Act of 1889.

The appellant had alleged in his declaration promises which had been made by the Crown to him, under the circumstances

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD LINDLEY, and SIR ARTHUR WILSON.

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stated in their Lordships' judgment, of occupation licences for the years 1900 and 1901 respectively, and possession thereunder. The respondent pleaded the annual leases to him, and denied the promises to the appellant. No trespass had occurred on land outside the area covered by the leases, and accordingly the judge formally ruled that the leases were invalid, and a verdict for 45*l.* was found for the appellant, with leave to the respondent to move to set the same aside and enter a verdict for himself on the whole action if the Court should hold that the annual leases were valid.

The respondent moved accordingly, with the result that the Supreme Court (Stephen J. dissenting) held that the leases were valid.

Owen J. rested his judgment upon s. 81 of the Crown Lands Act, 1884; and his view was that, if a licence fee was not paid within the time named in the *Gazette* notice, the Minister had the option at his discretion of refusing to renew the licence; and that if he once exercised that option and refused to renew, his determination was irrevocable and the licence was gone for ever. He regarded the *Gazette* notice of January 6, 1900, as an exercise of that option not to renew, and held it to be irrevocable. In his opinion, the pendency of proceedings for reappraisement made no difference. He held the action of the Governor in Council to be an absolute nullity.

Simpson J. concurred. He considered that the action of the Executive Council was ultra vires. He further held that the Minister for Lands had power to refuse to renew the appellant's licence, and in fact exercised that power by the notice in the *Gazette* on January 6, 1900. He did not think the Minister exercised a wise discretion in so refusing, but that, having exercised his discretion, his act was irrevocable, and the effect was that the licence expired on December 30.

Tyrrell, K.C., and *Alfred Adams*, for the appellant, contended that the order of the Supreme Court should be discharged and the verdict of the jury restored. They referred to the Crown Lands Act, No. 18, 1884, s. 81, sub-ss. 1 and 2, and contended that the rates for 1900 and 1901 were shewn by

the evidence to have been duly paid by the appellant and accepted by the Crown. Accordingly, at the time the lands were leased to the respondent they were not lands "not held under lease or licence" within the meaning of s. 33 of the Crown Lands Act, No. 21, 1889. Some difficulty had arisen in regard to the payment owing to the lands having been reappraised, and the amount payable being in consequence unascertained. But even if the appellant had been in default, non-payment did not determine his licence. The Minister must refuse renewal. That power did not arise till the rates of the reappraised fees were gazetted, which was not till February 19, 1900. It was contended that he had never purported to refuse, or that, if he had, it had been followed by revocation of his refusal and a renewal of the licences before the respondent's application for leases. The alleged forfeiture relied on by the respondent (if any) had been waived by the Crown, which had power to waive it under the circumstances: see *Davenport* v. *Reg.* (1) Reference was also made to Crown Lands Amendment Act (55 Vict. No. 1), ss. 3 and 6, and the interpretation clause; and it was contended that the reversal of the non-renewal of these licences had the same effect as if the non-renewal had never been declared.

Vaughan Hawkins, for the respondent, contended that his leases were valid, inasmuch as there had been an absolute forfeiture by the appellant of his licences. If the appellant had desired their renewal for the year 1900, he was bound to pay the licence fees in respect of them for that year before the end of 1899. He had not done so, and the proceedings for reappraisement were no excuse; for the old fees remained legally due and payable until reappraisement, subject to adjustment after reappraisement. The gazetted notice of September 30, 1899, was a decision and a publication of decision by the Minister that unless the fees were payable within sixty days from that date—specifying November 29 as the latest date—the licences "shall be deemed not to have been renewed." The effect of that was that at the date of the respondent's application for annual leases the land in question

(1) (1877) 3 App. Cas. 115.

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was Crown land not held under lease or licence, and therefore was available for the leases applied for, the grant of which was accordingly valid and vested title in the respondent. The rights of the parties turn on what was done before the end of 1899. The appellant was licensee for a year with option to renew before the licence expired. He did nothing, and his licence expired. Accordingly on January 6, 1900, it was notified that the licences of the lands in question had determined on December 31, 1899, and had not been renewed. It was not till February 14, 1900, two days after the respondent's application, that the Government gazetted a cancelment of the non-renewal, "subject to any conflicting interests that may have arisen since December 31 last, and also subject to any annual lease application that may have been lodged since that date." It was contended that the decision of the Minister not to renew had been made and notified, and could not be reversed or cancelled. Or that, if it could, it was subject to the statutory rights created by the respondent's application: see *Blackburn* v. *Flavelle*. (1) Moreover, it appeared that the Land Court on appeal from the Land Board had decided that the land was at the date of the application available for annual leases, and that decision, it was contended, was final and conclusive: see the Act of 1889, s. 8, sub-s. 5. With regard to the contention under the Act of 1891, the Act did not apply, having regard to the true construction and meaning of the interpretation clause, to the non-renewal of an occupation licence. It applied only to leases, and these did not necessarily include licences.

Tyrrell, K.C., replied.

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The judgment of their Lordships was delivered by

LORD DAVEY. The action in which this appeal has arisen was brought by the appellant to recover damages for trespass by the respondent on the appellant's land. The defence was, in substance, that the land on which the alleged trespass was committed was the land of the respondent and not that of the appellant. The question, therefore, is, Which party has the

(1) (1881) 6 App. Cas. 628.

better title? There are no facts in dispute, and the determination of the question turns on the construction and effect of certain sections of the legislation of the Colony of New South Wales respecting Crown lands, and the validity and effect of certain acts of the Minister for Lands.

By the Crown Lands Act, 1884 (48 Vict. No. 18), the Colony was divided for the purpose of the Act into three divisions, called the Eastern, Central, and Western Divisions. The land in question was formerly part of a pastoral holding called Barham, in the Central Division. Under the provisions of the Act this holding was some time since divided into two areas, called respectively the resumed and the leasehold areas, and the then holder became entitled to and obtained a lease from the Crown of the leasehold area and an "occupation licence" of the resumed area at an annual licence fee. On the expiration of the term granted by the lease of the leasehold area, the holder acquired what is called a "preferential occupation licence" of the land comprised in the lease. The rights of a holder of a preferential occupation licence, however, do not differ in any respect material to the present controversy from those of a holder of an ordinary occupation licence. In June, 1899, the appellant acquired the rights conferred by these two licences over all the lands comprised therein.

An occupation licence entitles the licensee to occupy the land comprised therein for grazing purposes. In its legal incidents it appears to their Lordships to resemble more nearly a lease for a year than a mere licence to use the land, and many sections of the Acts were quoted to their Lordships in which the rights of lessees and licensees are put on the same footing. The 2nd and 4th sub-sections of s. 81 of the Act of 1884 are as follows:—

"(2.) Licences shall be in force from the first day of January to the thirty-first day of December in each year, and the rates of licence fees shall be published in the *Gazette*, and if within sixty days thereafter such fees be not paid into the Treasury by the licensee, the Minister may refuse to renew such licence."

"(4.) Upon the granting of any lease or the sale of any

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land under occupation licence, the licensee's right of occupation to the extent of such portion shall thereupon cease, but he shall be entitled to a refund of so much of the licence fee paid in advance and to reduction in future rent as shall be proportionate to the area so withdrawn and from the date of withdrawal, and shall be entitled to be paid such compensation for improvements on any portion so withdrawn as the Minister may determine after appraisement by the local land board."

By the 199th article of the regulations made in pursuance of the Crown Lands Acts, it is prescribed that the licence fee of an occupation licence (whether preferential or otherwise) shall be paid annually in advance before December 1 in each year; but there is nothing to prevent the authorities from receiving payment of overdue licence fees, and it appears from s. 48 of the Act of 1895 that they may do so. There are no conditions imposed on the holder of an occupation licence except the payment of the licence fee, and there is no power given to the Minister by the Act to refuse to renew an occupation licence other than the qualified one conferred by sub-s. 2 of s. 81. The result is that, until the land is leased or sold, the occupation licence is renewable by the holder thereof, subject to the Minister's right to refuse to renew if the licence is not paid within sixty days after the amount of the licence fee has been published in the *Gazette*, as prescribed by sub-s. 2 of s. 81, and subject also to the Minister's right of directing a fresh appraisement to be made. This result seems to be in accordance with the scheme of the Act, for the right of the leaseholder to an occupation licence of the "resumed area," and to a preferential occupation licence of the "leasehold area," after the expiration of the lease, would be of little value if he were liable to be dispossessed at the end of any year at the will of the Minister; and, on the other hand, it is for the public benefit that Crown lands not immediately required for permanent settlement by lease or sale should be occupied and yield some return to the revenue.

On August 8, 1899, the appellant applied to the Minister for Lands to have a reappraisement made of the areas comprised in both his licenses. On August 22, 1899, the Minister, by

letter of that date, approved of the appellant's application being granted subject to his bearing the costs, which were estimated at 20*l.* for the two appraisements. On the following 5th September the appellant paid the sum of 20*l.* into the Colonial Treasury, and by letter of October 18, 1899, the Minister definitively approved of the application being granted, and informed the respondent that the necessary instructions had been issued to the local land board. To complete this portion of the story, the local land board on December 4 and 5, 1899, duly appraised the licence fees for the occupation licence of the resumed area and the preferential occupation licence at 6*l.* 13*s.* 4*d.* per section of 640 acres, being an increase on the rate of the previous license fees. These reappraisements were not, however, accepted by the Minister until January 19, 1900, when they became definitive, there having been no appeal by the appellant, and notice thereof was not inserted in the Government *Gazette* until February 17, 1900.

In the meantime, on September 30, 1899, a notification was published in the *Gazette* requiring licensees to pay their fees for the year 1900. The material paragraphs of this notification are the following:—

"Notice is hereby given that the rates of license fees for occupation licenses under s. 81 of the Crown Lands Act of 1884, payable in advance for the year 1900, are set out and published in the annexed schedule.

"All occupation license fees must be paid to the Colonial Treasurer within sixty days from the date of the publication of this notice, and if not so paid the licenses shall be deemed not to have been renewed.

* * * * * *

"The licences on which the fees remain unpaid on the 31st December next will immediately thereafter be notified in the Government *Gazette* as not having been renewed for the year 1900 and the lands will therefore be open for the purposes of the Crown Lands Acts from the 31st December."

The schedule to this notice contained (amongst many others) particulars of the Barham licences, and specified the licence fees payable for them at the old rates.

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It will be observed that this notice was issued after the Minister had approved the appellant's application for reappraisement, subject to the payment by him of 20*l.* for the costs and after the payment by him of that sum. It did not and could not comply with the terms of sub-s. 2 of s. 81 as respects the Barham licences, because the rates of the licence fees payable for the year 1900 were not at that time determined. They might be either less (as the appellant no doubt expected) or (as turned out to be the case) more than the rates of the fees payable for the previous year. It appears to have been assumed in the Court below that where lands were under reappraisement, the old licence fees continued to be payable until the reappraisement had been made subject to subsequent adjustment. And this assumption underlay the very able argument of Mr. Vaughan Hawkins for the respondent. But it was admitted that no enactment to that effect applicable to the present case can be found in the Acts. It was pointed out that in the 29th section of the Act of 1889, by which a licensee is entitled to a reappraisement upon application within ninety days from the commencement of the Act, it was thought necessary to provide in express terms that, pending reappraisement, the licensee shall continue to pay the previous fee. That section, however, has no application to a reappraisement made at the will of the Minister under sub-s. 1 of s. 81 of the Act of 1884, and their Lordships can find no grounds for holding that the appellant was liable to pay his licence fees according to the old rate, pending the reappraisement, or was in default for not doing so. The construction of sub-s. 2 of s. 81 is free from ambiguity, and their Lordships think that in any notice on which the Minister can found a right to refuse to renew a licence under that sub-section the amount of the true licence fee payable for the ensuing year should be stated. The result is that, in their Lordships' opinion, the Barham licences were erroneously comprised in the *Gazette* notice of September 30, 1899.

On January 6, 1900, a notice was inserted by the Minister of Lands in the Government *Gazette* in the following terms :—

"It is hereby notified for general information that the

occupation licences and preferential occupation licenses specified in the annexed schedule have not been renewed for the year 1900 in accordance with the provisions of the 81st section of the Crown Lands Act of 1884."

The schedule again comprised the two Barham licences. Their Lordships think that, reading this notice with the concluding paragraph of the notice of September 30, 1899, it was probably intended to operate as a notice of the Minister's refusal to renew the licences mentioned in the schedule. But standing alone the latter notice does not seem to express such refusal with sufficient clearness. It is not, however, worth while to pursue this point because it follows from what has already been said that, in the opinion of their Lordships, the notice had no effect on the Barham licences, notwithstanding that they were erroneously inserted in the schedule.

The appellant, on the publication of the last-mentioned notice, called on January 12, 1900, at the Lands Office at Sydney, and after an interview with one of the officials, paid the licence fees at the old rates into the Treasury to a suspense account. On January 19, 1900, as already mentioned, the Minister accepted the new appraisements, and on the following day (January 20), as stated in the admissions in the action, he approved of the reversal of "the non-renewal" of the Barham licences subject to any conflicting interests that might have arisen since December 31 then last, and also subject to any annual lease application that might have been lodged since that date. A minute to that effect was submitted to and confirmed by the executive council on January 23 following, and notice of it was gazetted on February 14, 1900.

Their Lordships have already mentioned the *Gazette* notice of February 17, 1900, of the new appraisement which had been made of the licence fees of the Barham licences. The notice stated that the amount shewn in column 10 of the schedule (being the new and enhanced fees) represented the fees payable for the year 1900, which were stated to take effect from January 1 of that year, and under the heading "amount now required" were entered the balances due after giving credit for the sums paid to a suspense account as already mentioned. In

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the view which their Lordships take of the 81st section of the Act of 1884, and of the facts of this case, this was the first and only notice which complied with the requirements of sub-s. 2, and the appellant could not be treated as in default until the expiration of sixty days from the date of it in case the fees should not then be paid. The appellant, who had remained in possession, paid the balances due from him representing the difference between the amount of the old licence fees and that of the new ones, and such payment, together with that of the sum previously paid by him which had temporarily been placed to a suspense account, were accepted by the Minister.

On February 12, 1900, the respondent, together with his three sons, made written applications to the local government land agent for four annual leases of 1920 acres each (making together 7680 acres), part of the appellant's holding. These applications were made under s. 33 of the Act of 1889, the relevant words of which are as follows :—

" Crown lands not held under lease or licence and not reserved from lease or licence shall be open to annual lease in the prescribed manner, and the first applicant shall have a right to an annual lease of the land applied for (subject to modification by the board," i.e., the land board) " on payment of such rent as the land board shall determine."

These words occur towards the end of a long section, the earlier part of which relates only to the eastern division. It was contended before their Lordships that the words quoted also referred only to the eastern division. The section is no doubt somewhat clumsily framed; but looking at the section itself and the context in which it is found, their Lordships think that the words relied on were intended to be a general enactment relating to the whole colony subject, as to the eastern division, to the special enactment. The point was not taken in the Court below, and it may be assumed therefore that the opinion of their Lordships upon it is in accordance with the view taken of the section in the colony. The question therefore is, whether the lands in question were under lease or licence within the meaning of the Act on February 12, the

date of the application. If they were, the respondent had no right to the lease applied for by him.

The applications of the respondent and his sons were referred to the local land board for investigation. That of the respondent only was in the first instance proceeded with. The board found that the land which was the subject of the application was not available for annual lease, and recommended the refusal of the application. On appeal the Land Appeal Court reversed this finding. Their Lordships have not the reasons for the judgment of the latter Court before them. The judgment itself was not pleaded as an estoppel in this action.

Consequently on the decision of the Land Appeal Court all four applications were reconsidered by the Land Board, and in the result leases were granted to the respondent and his three sons of the lands for which they had applied. The respondent thereupon entered upon the lands comprised in his own lease and on the lands comprised in his sons' leases by their leave and licence. This is the trespass complained of in the action. There was an allegation by way of new assignment in the replication that the respondent had also trespassed on other lands not comprised in the leases, but this was negatived by the verdict of the jury.

The action was tried by Simpson J. and a jury of four persons at the Circuit Court at Deniliquin. By arrangement the learned judge ruled that the leases were invalid, and thereupon a verdict was given for the appellant with 45*l.* damages for trespass on the annual leases, leave being reserved to the respondent to move to set aside the verdict and enter the verdict for him.

Accordingly a rule nisi was obtained by the respondent, and argued before three judges of the Supreme Court. By the judgment of that Court, dated May 1, 1902, the rule nisi was made absolute, and the verdict in favour of the present appellant was set aside, and a verdict was entered for the present respondent with costs. The present appeal is against that order.

Two of the learned judges before whom the rule was argued

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(Owen J. and Simpson J.) held in substance that the appellant was in default for non-payment of the licence fee required by the notice of September 30, 1899, and the Minister had the option at his discretion of refusing to renew the licence, and that he exercised that option by the notice of January 6, 1900, and the appellant's licences thereupon ceased to exist. They further held that the Executive Council had no power to reverse the decision of the Minister not to renew, and its action on January 23, 1900, was a nullity. The other judge (Stephen J.) dissented from his brethren, holding that the *Gazette* notice of January 6, 1900, was not an exercise of the Minister's option not to renew, and, if it were, it was not irrevocable, and the Minister might and did change his mind, and the minute of January 22 being passed on his recommendation was an effectual reversal by himself of his former decision, notwithstanding that he unnecessarily sought the confirmation of the Executive Council.

For reasons which have already been stated, their Lordships cannot agree with the decision of the majority of the Court. Shortly, they think that the appellant was not in default on January 6, 1900, and the Minister had no power at that date to refuse to renew the licence, and they regard the insertion of the appellant's licenses in the schedules to the two *Gazette* notices of September, 1899, and January 6, 1900, as being made in error, and the Minister's refusal to renew (if he did refuse) as given without authority. They think it was not only competent for the Minister, but it was his duty to rectify the mistake on his attention being called to it, and this he did by his approval of the reversal of the non-renewal on January 20, 1900, which was none the less his act because he presented it to the Executive Council for confirmation. This being so, their Lordships think that the Land Board took the correct view in holding that the lands were not available for annual lease on February 12, the date of the respondent's application.

Their Lordships also think that the appeal can be maintained on the Act of 1891, 55 Vict., No. 1, relating to the reversal of forfeitures. This point was very fully argued before them. They therefore think it right to express their opinion upon it,

but they do so with some reserve, as it is not mentioned in any of the judgments delivered in the Supreme Court. By the 3rd section of the Act of 1891 the Minister is empowered to reverse, whether provisionally or otherwise, any forfeiture already notified, declared, or otherwise asserted or enforced, subject to certain conditions; and by the 6th section it is provided that in any case in which a purchase, lease, or licence has become liable to forfeiture by reason of the non-fulfilment of any condition by mistake or other innocent cause, the Minister may waive the forfeiture. By the interpretation clause "forfeiture" includes the lapse or voidance of any contract with the Crown under any repealed Act or the principal Act (i.e., the Act of 1884) for the purchase or leasing of Crown lands. The word "lapse" seems an apt expression for the loss of any interest in land by reason of an omission to renew, or the non-performance of a condition, such as the payment of money. But it is said that the words "purchase or leasing of Crown lands" (assuming that they are to be read with "contract") do not include the grant of an occupation licence. Their Lordships think this a narrow construction of the words. An exclusive and transferable licence to occupy land for a defined period is not distinguishable from a demise, and in the legislative language of the Land Acts (1) the words "leased," "lease," and "lessee," are frequently used as words of a generic import, including lands held under occupation licence, or the licence or the holder thereof. In this Act a "licence" is by express words within s. 6, and there is nothing in s. 3 which forbids or is inconsistent with its extension to licences. It would therefore seem that, assuming the *Gazette* notice of January 6, 1900, to have been equivalent to a refusal by the Minister to renew, and that he was in a position to refuse to do so, his approval on January 20, 1900, operated as a reversal of the "forfeiture" thereby asserted or notified. As remarked in another connection, it was none the less the act of the Minister because it was subsequently submitted to the Executive Council for confirmation. By the 3rd and 6th conditions of s. 3 the

(1) Act of 1884, s. 98, sub-s. 1; Act of 1884, s. 126; Act of 1889, s. 10; Act of 1895, s. 53.

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absolute reversal of a forfeiture has the same effect as if the forfeiture had never been notified or declared or otherwise asserted or enforced, and the date of such reversal is the date of the Minister's approval thereof. As, however, their Lordships have not the advantage of having the opinion of the Supreme Court on this point, which does not appear to have been taken there, they do not intend by this expression of their opinion to preclude this Board from reconsidering it, if it should come before them in another case.

Their Lordships will not part with this intricate and complicated case without expressing their obligation to counsel on both sides for the assistance rendered by them in the consideration of it. Their Lordships believe that every point which could fairly be taken on either side was brought to their attention and fully and thoroughly discussed.

Their Lordships will humbly advise His Majesty that the order of the Supreme Court of May 1, 1902, should be reversed, and that instead thereof the rule nisi obtained by the respondent on November 12, 1901, should be discharged with costs. This will leave standing the verdict of the jury in the appellant's favour with 45*l.* damages. The respondent will pay the costs of this appeal.

Solicitors for appellant: *Bell, Brodrick & Gray.*

Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

EDYVEAN AND OTHERS . . . . . APPELLANTS;

AND

ARCHER AND OTHERS . . . . . RESPONDENTS.

In re HARRIETT BROOKE, DECEASED.

J. C.*
1903
May 26;
June 18.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

Will—Construction—Gift over—Issue.

In a gift over on failure of the line of one child to "other of my children and their issue," the word issue must receive its plain and ordinary meaning, and not be restricted to the issue of children dying in the lifetime of the testatrix unless the rest of the will plainly requires it. The gift over in this case was subject to the condition that those only took under it who were also beneficiaries under the original gift, in which original gift issue was restricted as above by the immediate context:—

Held, that that was insufficient by itself to control the meaning of the word used in a new connection. Accordingly the appellants were entitled to share in the said gift over as issue of a child other than the child whose line had failed; and this notwithstanding that under the original gift they had taken in substitution for their mother.

APPEAL from a decree of the Supreme Court (Feb. 24, 1902).

On August 29, 1901, the respondents, trustees of the will in suit, took out, under the circumstances stated in their Lordships' judgment, a summons under "The Trustee Act, 1898," for an order of a judge in chambers as to the true construction of a gift over contained in the first codicil to Mrs. Brooke's will. The appellants (trustees of Mrs. Edyvean's marriage settlement), together with Mrs. Edyvean and her brother, J. G. M. Adams, and the children of three daughters of the testatrix (who were sisters of Mrs. Edyvean's mother, the respondent, Maria R. Adams) were served therewith.

On a question referred by the judge in chambers to the

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Supreme Court, the latter held that, presuming the three sons of the testatrix took only life interests in the moneys to arise from the sale of the settled lands, "we are of opinion that J. G. M. Adams and Jessie Harriett Edyvean take no interest in the three undivided seventh shares of the said moneys held for life by the said three sons respectively."

The reasons stated were in substance:—

(1.) Because in the gift over in the first codicil to "the other of my children and their issue to whom or in whose favour I have hereinbefore appointed the moneys to arise as aforesaid" the word issue ought to be restricted to the issue of children who predeceased the testatrix.

(2.) Because the respondent Maria Rebecca Adams was not included in the words "the other of my children" contained in the said gift over, and therefore the appellants J. H. Edyvean and J. G. M. Adams (the children of the respondent Maria Rebecca Adams) were not included in the words "and their issue."

Haldane, K.C., and *Potts*, for the appellants, contended that in the gift over the word "issue" ought not to be restricted to the issue of children who predeceased the testatrix. The only restriction which ought to be imposed on its meaning is that which is imposed by the wording of the gift over—that is, the persons to take thereunder, whether children or issue of children, must be members of the class to whom the moneys to arise from the sale of the settled lands were originally appointed by the first codicil. Then the appellants Jessie Harriett Edyvean and J. G. M. Adams are issue of a child of the testatrix, and are members of a class to whom the moneys to arise from the sale of the settled lands were originally appointed by the first codicil. They therefore became and were entitled under the gift over to one-fourth of the three undivided seventh shares of the moneys which the three sons had held for life.

Warmington, K.C., and *O. Leigh Clare*, for the respondents (beneficiaries under the gift over other than Grane), contended that, upon the true construction of the words "the other of my

children and their issue" in the gift over, the word "children" ought to be taken in its natural sense, and not as including grandchildren, there being nothing in the context to alter the ordinary meaning of that word. Then as regards the word "issue," the testatrix had already in the first codicil given her own definition of it as applying only to issue of children dying in her lifetime. The context must, therefore, be taken to limit the meaning of the word issue in the gift over. It ought to be construed as referring to the same issue in the restricted sense, namely, the issue of those children of the testatrix who had died in her lifetime. There was nothing in the context which pointed to the testatrix conveying different meanings by the same word. Consequently the mother (who was still living) of Mrs. Edyvean and J. G. M. Adams was not included in the words "the other of my children"; and her children were not included in the words "and their issue."

C. Gurdon, for the respondent Grane.

J. Austen-Cartmell, for the respondents, the trustees of the will.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The question in this case depends upon the meaning and effect of one clause—a clause in the shape of a gift over—occurring in a testamentary appointment contained in a codicil to the will of the late Harriett Brooke, wife of the Rev. Warren Auber Brooke.

Mrs. Brooke died on May 31, 1886. There was no issue of her marriage with Mr. Brooke. By a former marriage with a Mr. Landale she had seven children, who survived her. There were three sons, Clarence, Richard, and William Dry, who all attained twenty-one and died without having been married. There were besides four daughters, each of whom was married in Mrs. Brooke's lifetime and had issue. One of the four, Maria Rebecca Adams, now a widow, had two children, Jessie Harriett, the wife of William Henry Edyvean, and John Garibaldi Marriott Adams.

The appellants are Mrs. Edyvean, her brother, Mr. J. G. M. Adams, the trustees of Mrs. Edyvean's marriage settlement, of

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whom Mr. J. G. M. Adams is one, and an incumbrancer on his share. The respondents are the trustees of Mrs. Brooke's will, and the children of the other three daughters of the testatrix, all now deceased. The controversy between the parties is as to the right of the two children of Mrs. Adams to participate in the distribution of certain moneys appointed by the testatrix to or in favour of her three sons, in which, in the events that happened, they took only a life interest.

Two settlements were executed on Mrs. Brooke's second marriage, both dated February 13, 1857. One is referred to as the "Boiton Hill settlement," the other as the "general settlement." Under the former Mrs. Brooke had a general power of appointment; under the latter she had a power of appointment in favour of her children and remoter issue.

By a codicil dated September 7, 1882, Mrs. Brooke revoked certain directions contained in her will as to the disposal of the moneys to arise from the sale of Boiton Hill except as to the life estate thereby given to her husband, Mr. Brooke. In lieu thereof Mrs. Brooke appointed that the trustees of her will should after Mr. Brooke's death stand possessed of the moneys to arise from the sale of Boiton Hill and the investments thereof upon trusts declared as follows: "Upon trust for such of my children living at my decease (other than and except my daughter Maria Rebecca Adams) and for my grandchildren Jessie Harriett Adams and John Garibaldi Marriott Adams in place of and in substitution for their mother the said Maria Rebecca Adams and such of the issue then living of any child or children of mine dying in my lifetime as either before or after my decease being males attain the age of twenty-one years or being females attain that age or be married as tenants in common in a course of distribution according to the stocks the said J. H. Adams and J. G. M. Adams taking one share only between them and the issue of deceased children of mine taking by substitution the shares only which their respective parents would if living at my decease have taken." The testatrix then directed that the net moneys to arise from the sale of the lands comprised in the "general settlement" and then remaining undisposed of should be held upon trusts

declared as follows: "Upon trust for such of my children grandchildren and issue living at my decease in whose favour I have hereinbefore directed and appointed the moneys to arise from the sale of my estate of Boiton Hill and in the same parts shares and proportions but subject as to the share of each child of mine to the directions and declarations hereinafter contained concerning the same and I direct and declare that the share to which each child of mine shall become entitled in the moneys to arise as aforesaid shall be retained and held by the said trustees or trustee upon trust to invest the same . . . . and upon further trust to pay the annual income of the same share or the securities whereon the same shall be invested (which share and securities are hereinafter referred to under the denomination of 'the said settled fund') . . . . into the proper hands of my child entitled thereto during his or her life . . . . as a strictly personal provision . . . . and immediately after the decease of my same child as to as well the capital of the said settled fund as the annual income thenceforth to accrue due for the same" upon certain trusts for the benefit of the child and children of the same child. The testatrix then proceeded to declare her will as follows: "but if there shall not be any child of my same child who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married then in trust for the other of my children and their issue to whom or in whose favour I have hereinbefore appointed the moneys to arise as aforesaid and as to the shares of such my children respectively upon the same or the like trusts as are hereinbefore declared concerning the original shares of such children respectively."

The whole question turns upon this last clause. The appellants point out that the moneys set free by the death of a child under circumstances that bring into operation the gift over are (in the words of the testatrix) "to be held in trust for the other of" her "children and their issue"—that is for her other children and the issue of her other children—but subject to this condition or qualification, that those only share in the ultimate distribution who take by appointment under the original gift.

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The testatrix collects her other children and the issue of her other children into one gathering, and out of the number she chooses those who are beneficiaries under the original gift. Inheritance or succession under the original gift was obviously the leading idea in her mind and the one qualification for participation in the substituted gift.

The case of the appellants is simplicity itself. They say that the two children of Mrs. Adams are issue of one of the testatrix's children other than the child whose line has failed. That is a proposition that cannot be disputed if the word "issue" is to have its ordinary grammatical signification, or indeed any recognised meaning of which the word is capable. They also say that they are among the number of those who take by appointment under the original gift. That again is a proposition which cannot be disputed. So the two children of Mrs. Adams come within the very words of the gift over, if those words are to be understood in their plain ordinary meaning. Why then are they to be excluded?

There are three grounds upon which it has been contended that their claim must be rejected. In the first place it is said that although they may be issue of one of the testatrix's other children in the ordinary sense of the word, yet they are not included in the term "issue" in the gift over, because they were not comprehended in the term "issue" in the original gift. That was the view of the Full Court, citing and relying upon what was said by Lord St. Leonards in *Ridgeway* v. *Munkittrick* (1): "It is a well settled rule of construction," said his Lordship, "never to put a different construction on the same word where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." That dictum, asserted perhaps too positively as a general rule of construction, does not help one much in construing such a will as this. What is a clear intention? That which is clear to one man is not always clear to another. A sounder, or at any rate a safer, rule is to be found in the observations of Knight Bruce V.-C. on the meaning of this very word "issue." "Before I can restrain that word," said the

(1) (1841) 1 D. & War. 84; 58 R. R. 220.

Vice-Chancellor in *Head* v. *Randall* (1), "from its legal and proper import, I must be satisfied that the contents of the will demonstrate the testator to have intended to use it in a restricted sense"; and then he goes on to observe that the language of Lord Eldon applied to property in *Church* v. *Mundy* (2) might well be applied to persons in a case like that before him. Lord Eldon's words were these: "The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like demonstration plain to the contrary."

Now it seems to their Lordships that when this codicil is carefully considered, there is nothing to shew that the testatrix intended to use the word "issue" in the clause now under consideration in any other but its proper sense. The language of the gift over is not a mere repetition of the language used in the original gift, or an abridged reference to it. There is a marked difference in expression. On the other hand, the language of the original gift of the proceeds of the property comprised in the "general settlement" is obviously a compendious repetition of the language used in the original gift of the proceeds of Boiton Hill. It is just as if the testatrix had put in the word "aforesaid" before the words "children, grandchildren, and issue" in the original gift of the proceeds of the property comprised in the "general settlement." If you insert that word, which is clearly implied, it becomes quite plain that the word "issue" is not used in any restricted sense. It is applied, and by force of the context confined, to the issue of children of the testatrix dying in her lifetime. That is the reason, and the only reason, why neither children of the testatrix nor the two children of Mrs. Adams are comprehended in the word "issue" in the original gift of the proceeds of the property comprised in the "general settlement."

There is another ground upon which the Full Court relied in rejecting the claims of Mrs. Adams' children. It is stated

(1) (1843) 2 Y. & C. 231, at p. 235; 60 R. R. 128, 131.

(2) (1808) 15 Ves. 396, at p. 406.

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in the following passage of the judgment under review: "There is another point, however, to be considered, which appears to dispose of the whole question. If the words 'the other of my children' do not include Mrs. Adams, it is clear that her two children are not comprised in the term 'issue,' whatever meaning it may carry; that the words referred to cannot include Mrs. Adams seems clear, for the simple reason that the original gift is to her two children to her exclusion. In the appointment of original shares under the general settlement the words are: 'for such of my children, grandchildren, and issue living at my decease in whose favour I have hereinbefore directed and appointed the moneys to arise from the sale of my estate of Boiton Hill.' Under the terms of this appointment Mrs. Adams could not successfully claim a share in the original moneys appointed as aforesaid. The same construction must follow as to the gift over." Their Lordships are unable to follow the reasoning in this passage. In the gift over the children of Mrs. Adams take under the word "issue," and wholly independently of their mother. The view of the Full Court, if it were correct, would not only exclude Mrs. Adams' children, but also the children of any other of the testatrix's children who might happen to die in her lifetime leaving children. It cannot be supposed that the testatrix intended such a result as that.

The third ground for excluding Mrs. Adams' children was suggested by Mr. Warmington in his able argument for the respondents. He said that the children of Mrs. Adams were in some respects placed in a better position than the other beneficiaries. Their share would not go over to an uncle, aunt, or cousin in any case. It was therefore only reasonable that they should not participate in the gift over of the shares of the other beneficiaries. There was, in fact, a sort of settlement within a settlement, and there were, so to speak, cross-limitations between those interested in the settlement fund provided for the beneficiaries other than the children of Mrs. Adams. Possibly that might have been a reasonable disposition if the testatrix had so willed it. But the testatrix has done nothing of the kind. When she speaks of the "said

settlement fund," she is not referring to a settlement fund in which all the beneficiaries other than Mrs. Adams' children are interested. By the "said settlement fund" the testatrix describes the individual share of each of her children other than Mrs. Adams who might happen to survive her.

It only remains to add that there is no reason to be discovered why Mrs. Adams' two children should be placed in a worse position than the children of any child of the testatrix who might happen to die in her lifetime. The testatrix seems to have had singular confidence in Mr. J. G. M. Adams. Young as he was, she puts him in the position of guardian to his own mother. She had evidently a great affection for Mrs. Edyvean, as is shewn by the gift of jewellery to her.

For these reasons their Lordships think that the judgment of the Full Court ought to be reversed except as to costs, and that, in answer to the question submitted to the Court, a declaration should be made to the effect that the appellants, Mrs. Edyvean and Mr. J. G. M. Adams, became entitled in equal shares under the gift over to one-fourth of the three undivided seventh shares of the moneys to which the said Clarence Landale, Richard Landale, and William Dry Landale were respectively entitled for life.

Their Lordships will, therefore, humbly advise His Majesty accordingly.

In regard to costs, their Lordships cannot but express their regret that costs appear to have been unduly increased. There was nothing to justify severance in the case of the respondents beneficially interested. These respondents will be allowed only one set of costs, in which any respondent who unnecessarily appeared separately will not participate. This matter is left to the registrar to decide, subject to a reference to their Lordships without appearance by the parties. The parties having consented, the trustees will be allowed their costs. The registrar will consider whether it was necessary that the agreed statement of facts should be repeated at length four times over, in the case of the appellants and the case of the trustees as well as in the cases of both the other sets of

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respondents. Subject to these observations, the costs will be taxed as between solicitor and client and be paid out of the general estate.

Solicitors for appellants: *Hepburn, Son & Cutcliff.*

Solicitors for respondent beneficiaries: *Stibbard, Gibson & Co.*

Solicitors for Grane: *Church, Rendell & Co.*

Solicitors for respondent trustees: *Nisbet, Daw & Nisbet.*

[HOUSE OF LORDS.]

HULTHEN . . . . . APPELLANT;

AND

C. A. STEWART & CO. . . . . RESPONDENTS.

H. L. (E.)
1903
May 25.

Ship — Charterparty — Demurrage — Discharge of Cargo — "As fast as the Steamer can deliver"—Reasonable Despatch under the Circumstances—Liability for Delay.

A clause in a charterparty providing that the cargo is to be discharged with customary steamship despatch as fast as the steamer can deliver during the ordinary working hours of the port of discharge, but according to the custom of the port, is not tantamount to fixing a definite number of days or hours during which the discharge is to be completed. To create such a liability the days or hours must be specified in plain terms. This construction of the clause is not affected by a special exception in the case of a strike, a lock-out or epidemics. Demurrage is not due if the discharge is effected with the utmost despatch practicable, having regard to the custom of the port, the facilities for delivery, and all other circumstances not brought about by or within the control of the person whose duty it is to take delivery.

The decision of the Court of Appeal, [1902] 2 K. B. 199, affirmed.

THE appellant, as owner of the steamship *Anton*, sued the respondents, as indorsees and receivers under a bill of lading, to recover demurrage for detention of the ship at London, her port of discharge. The bill of lading incorporated a charterparty of which clause 3 provided thus: "The cargo to be loaded and discharged with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used), in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging demurrage shall be paid at" a certain rate. Clause 5 provided thus: "If the cargo cannot be loaded or discharged by reason of a strike or lock-out of any class of workmen essential to the loading or discharge of the cargo, or by reason of epidemics, the time for loading or discharging shall not count during the continuance of such strike or lock-out or epidemic. . . . ."

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The ship with a cargo of timber reached Gravesend within the port of London on October 12, 1900. The ordinary time required for the discharge of such a ship with customary steamship despatch was five days. Owing to the crowded state of the docks the ship did not get to her berth till October 22 (Saturday) and did not complete her discharge till October 29. Phillimore J., by whom the action was tried, found as a fact that the respondents had done all they reasonably could to discharge the vessel, and dismissed the claim for demurrage with costs. This decision was affirmed by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) on the ground that the authorities mentioned below were conclusive. (1) The shipowner appealed.

March 3, 5. *J. A. Hamilton, K.C.*, and *Leck*, for the appellant.

Robson, K.C., and *Loehnis*, for the respondents.

Hamilton, K.C., in reply.

The authorities above referred to were: *Postlethwaite* v. *Freeland* (2); *Hick* v. *Raymond* (3); *Wyllie* v. *Harrison* (4); *Good* v. *Isaacs* (5); *Lyle* v. *Cardiff Corporation*. (6)

The House took time for consideration.

May 25. EARL OF HALSBURY L.C. My Lords, in this case the question of fact has been disposed of by Phillimore J., and I think no one of the learned Lords Justices entertains any doubt upon it. Practically there has been no serious dispute that the facts are as found by that learned judge. The sole question which remains is as to the construction of a common clause in the charterparty. I confess I entertain some surprise that this question should have been debated, because, in my view, it has practically been decided by a somewhat long series of authorities and by decisions of this House.

There are two forms in which charterparties of this character

(1) [1902] 2 K. B. 199.
(2) (1880) 5 App. Cas. 599.
(3) [1893] A. C. 22.
(4) (1885) 13 R. 92.
(5) [1892] 2 Q. B. 555.
(6) [1900] 2 Q. B. 638.

can be made. In one a specific number of days are given within which the discharge is to be taken, and, if those days are exceeded, quite apart from the circumstances, the demurrage is due. If, on the other hand, the parties choose to agree, not to a definite number of days, but to a charterparty such as this, they necessarily import into it the circumstances under which the discharge takes place. If the learned judge in this case was right in thinking that humanly speaking everything was done to enable the discharge to be taken, it is idle to suggest that a well-recognised form, in which an absolute unconditional obligation is taken, is to be imported into that which, of itself, involves the necessity of considering the circumstances. The reasonable amount of diligence which can be exacted is that which the circumstances of the case suggest. In this case the learned judge has, with great precision, taken every hypothesis. He has ascertained when the ship arrived, he has pointed out, by reasoning which it is impossible to answer, that all the diligence which could be expected was exhibited by the respondents; and it comes back to the question, What is the true construction of these words?

So far as I can understand the argument, it is that you are to take the capacity of a vessel as equivalent to a number of days, and that, because the capacity of this vessel was five days, therefore you are to substitute in a contract between the parties the words "five days" for the words you actually find, so as to make that an absolute and unconditional term. It seems to me that that is reasoning for which there is no foundation. Without going through the cases, it appears to me that every one of these attempts to import an absolute unconditional burthen upon the charterers has always failed, because it is to be measured by the legal test, namely, what is reasonable under the circumstances.

My Lords, another argument which appears to me to have as little foundation is that there is a strike clause here, and, inasmuch as the parties have provided for the event of a strike expressly, therefore everything else which has delayed the discharge, but which is not caused by a strike, must be imported into the contract as a thing for which the charterers are

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responsible. I am wholly unable to follow the cogency of that argument. It seems to me absolutely unreasonable, and one for which there is no foundation. I think that the judgment of Phillimore J. and the Court of Appeal is perfectly right, and should be affirmed; and I move that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, the question in this case turns on the meaning and effect of the provisions of a charterparty in use in the White Sea wood trade, and commonly known as the Chamber of Commerce White Sea Wood Charter.

The charterparty provides that the cargo is to be "discharged with customary steamship despatch as fast as the steamer can . . . . deliver during the ordinary working hours" of the port of discharge, "but according to the custom" of the port, "Sundays, general or local holidays (unless used), excepted."

The question is, What is the meaning of this provision? Is it tantamount to fixing a certain definite number of days or hours as the period within which the discharge of the vessel is to be accomplished? Taking the words by themselves, apart from all authority, I should say certainly not. The words used do not specify, or even, I think, point to a definite period of time. What they do point to is the discharge of the cargo with the utmost despatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time not being circumstances brought about by the person whose duty it is to take delivery or circumstances within his control.

The learned counsel for the appellant laid much stress upon the fact that this was a charter in common form and in use in a particular trade. They urged that the convenience of the parties interested required that it should be expressed in general terms. The shipowner, they said, would know, and the charterer would ascertain, the time required for delivery of the cargo when the ship was working as fast as she could, and that time would of course be measured by days and hours. Their

contention, therefore, was that the language actually used had precisely the same meaning and effect as if the obligation of prompt despatch described by reference to the ship's power of discharging her cargo had been translated into measured portions of time. That, however, is not, I think, the way in which such a provision would strike an ordinary person glancing over the terms of a printed form of charter, and at the moment perhaps more intent on securing an advantageous freight than on providing for strange emergencies. I cannot help thinking that any person who might happen to sign a charterparty in this form would be much astonished to be told that by so doing he had come under an unconditional liability to take delivery within a fixed limit of time. He would probably say that he had not meant to do anything of the kind; possibly he might complain that he had fallen into a trap.

The suggestion—for it was nothing more than a suggestion—that the convenience of business requires that the charterparty, though intended in each case as between the contracting parties to impose a special and peculiar liability, should be expressed in general terms and in a common form, is not, I think, one of much weight. Nothing, as it seems to me, would be easier than to add to this common form half a line which, if not wanted, might be struck out or left partly in blank, but which could be filled up with the number of days allowed if the charterer were willing to take upon himself the burden of unconditional liability. That, and an appropriate note in the margin, would, I suppose, answer every purpose.

I have only to add on this part of the case that the special exception in a subsequent clause of a "strike," a "lock-out," and "epidemics" does not, in my opinion, restrict or affect the meaning of the clause providing for prompt despatch in delivery. I quite agree with Mathew L.J. that ingenious arguments founded on such special exemptions savour of subtility equally foreign to the way in which clauses in charterparties have been put together and built up, and the manner in which mercantile instruments are understood by business men.

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So the case, I think, would stand if there were no authority on the subject. But it is certainly satisfactory to find that there is a series of decisions, some in this House and others of great weight both in this country and in Scotland, which leave little or no room for argument. It is, I think, established that, in order to make a charterer unconditionally liable, it is not enough to stipulate that the cargo is to be discharged "with all despatch," or as "fast as steamer can deliver," or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished. I am, therefore, of opinion that the appeal must be dismissed with costs.

My noble and learned friend Lord Ashbourne has asked me to say that he has read this opinion and entirely concurs in it.

LORD DAVEY. My Lords, the learned judge's findings were that the respondents did all that they reasonably could to give discharge to this vessel. That is a finding of fact, and it then becomes a question of law, Aye or no, are the respondents liable by virtue of the terms of the charterparty, although they have done all that, humanly speaking, was reasonably possible for them to do in order to secure the vessel reasonable despatch? Upon that question I think there can be but one answer when you read the terms of the charterparty, because I think it would be impossible to come to a conclusion favourable to the argument of the appellant unless you imported words into the charterparty and gave it a wholly different complexion from that which the words used by the parties naturally bear. I agree with the reasons which have been given by your Lordships already for coming to that conclusion, and I need not repeat them.

Several cases were cited in the course of the argument. I have been through those cases, and I am of opinion that they support the argument of the respondents. I will not discuss them, because they have been very fully and satisfactorily discussed by the Master of the Rolls; and, as I am quite

prepared to adopt the reasons for their judgments which were given by the Master of the Rolls and his learned colleagues in the Court of Appeal, I need not trouble your Lordships by saying more than that I concur.

LORD ROBERTSON. My Lords, I entirely agree.

LORD LINDLEY. I agree, and I cannot usefully add anything.

Order of the Court of Appeal and judgment of Phillimore J. affirmed, and appeal dismissed with costs.

Lords' Journals, May 25, 1903.

Solicitors: *Stokes & Stokes; Trinder, Capron & Co.*

[HOUSE OF LORDS.]

(COMMITTEE FOR PRIVILEGES.)

THE POULETT PEERAGE.

Legitimacy—Paternity of Child born in Wedlock—Husband and Wife, Statements by as to Paternity—Access or Non-access before Marriage.

Less than six months after the late Earl Poulett's first marriage a son was born, a full-grown child. In a suit to perpetuate testimony, Earl Poulett deposed that he had never had sexual intercourse with his wife before the marriage; that soon after the marriage she confessed to him that she was at the time of the marriage enceinte by another man, the father of the child; that he then separated from his wife for ever and never acknowledged the child as his. Upon the question of the legitimacy of the child in a claim to the peerage:—

Held, that the deposition of Earl Poulett was admissible as evidence that the child was a bastard.

Anon. v. *Anon.*, (1856) 22 Beav. 481; 23 Beav. 273, overruled.

ON June 23, 1849, the sixth Earl Poulett, then Mr. Poulett, married his first wife, Elizabeth Lavinia Newman. On December 15, 1849, she was delivered of a son. In August, 1849, Mr. Poulett left his wife, made provision for her by a

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separation deed and never again lived with her. In 1864 Mr. Poulett succeeded to the Earldom. In 1871 the first wife died, and Lord Poulett married a lady who died without issue. In 1879 he married Miss Rosa Melville, and on September 11, 1883, a son was born named William John Lydston. In January, 1899, Earl Poulett died, and claims to the peerage were made by the son of the first wife and by Rosa, Countess Poulett, on behalf of her infant son. On the hearing before the Committee for Privileges the marriage in June, 1849, and the birth of a son in the following December were proved on behalf of that son's claim. An expected witness not being present, evidence was then heard in support of the other claimant, including three depositions made in a suit to perpetuate testimony brought on his behalf in 1884. The first was that of Dr. Perks, who was present at the birth of the first wife's child, and who said the child was a full-grown and not a six months child. The second was that of Mrs. Alexander, a friend of the first wife, who said she was told by the first wife shortly before her marriage that she was enceinte by Captain Granville, with whom she had lived. This statement was objected to on the ground that it was a statement by the mother tending to bastardise her own child. It was admitted. The third deposition was that of the sixth Earl, who said that he had never had sexual connection with Miss Newman before he married her; that he left her within two months of the marriage "in consequence of his taunting her with being with child, which she was obliged to admit, and she also admitted that she had been so before the marriage, and that Captain Granville was the father"; that he never cohabited with her again, and that he never acknowledged the child as his.

This statement being objected to, the question was argued on July 24.

Bennett Calvert, for the son of the first wife, cited *Anon.* v. *Anon.* (1) as an authority that the evidence was not admissible. In that case Sir John Romilly M.R. said that as a husband or

(1) 22 Beav. 481; 23 Beav. 273.

wife could not be asked questions relating to access or non-access after a marriage has taken place, the same principle must apply "to a child who becomes legitimate by the fact of a marriage subsequent to his conception, but previous to his birth," and that he could not in that case allow the wife to be asked any question as to whether the husband had or had not access to her before the marriage.

Warmington, K.C., and *Haldane*, K.C. (*Lindsay*, K.C., and *R. J. Quin* with them), for the son of the third wife. That decision must be overruled or disregarded. It has long been settled law that the presumption as to the legitimacy of a son born in wedlock is merely a presumption which may be rebutted, in the same way as other presumptions are, by evidence which shews that it is impossible or unlikely: see Le Marchant's Account of the Gardner and Banbury Peerages, preface, p. xlix., and the observations of Lord Eldon, Lord Redesdale, and Lord Ellenborough, appendix, pp. 389, 431, 436, 455, 489; *Burnaby* v. *Baillie* (1); and *The Aylesford Peerage*. (2) The rule as to excluding the parents' testimony, that they have or have not had connection, on the grounds of decency, morality, and policy, applies only to intercourse during marriage, and is not in any way affected by the statements now tendered. They are evidence of a fact which happened before the marriage—the conception of the child the result of intercourse with a man other than the husband. The statements are therefore admissible.

Sir R. Finlay, A.-G. (*G. R. Askwith* and *Geoffrey Ellis* with him), for the Crown, submitted that the evidence was admissible, and referred to Taylor on Evidence, 8th ed. vol. i. p. 571, s. 649, and p. 817, s. 950, where all the cases are cited and discussed.

[LORD ROBERTSON referred to *Gardner* v. *Gardner*. (3)]

Bennett Calvert, in reply. The evidence now tendered, being statements by the husband and wife as to intercourse before the marriage, and a confession after marriage by the wife to her husband, violate the rule, and are as objectionable on

(1) (1889) 42 Ch. D. 282, 298. (2) (1885) 11 App. Cas. 1.
(3) (1877) 2 App. Cas. 723.

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the ground of decency, the sanctity of marriage, morality, and public policy as any testimony which has always been excluded by that rule; the result is the same—to bastardise the child. The decision of Sir John Romilly M.R. in *Anon.* v. *Anon.* (1), laying down the principle of exclusion, is sound. It is against public policy and morality that a man should be allowed to say of a woman whom he married that she had or had not connection with him before marriage. And this is an extreme case, for the wife was dead when the husband gave this evidence, and there was no one alive to contradict him. There is no real distinction in principle between a declaration as to what took place before marriage and a declaration as to what took place during marriage.

EARL OF HALSBURY L.C. My Lords, there is no doubt that the question which is raised here is a very important one. I shall submit to your Lordships that the evidence tendered is properly admissible. There was at one time authority for saying that if the husband and wife were within the four seas you must presume that there was intercourse, and that you could not possibly contradict it. I think that idea is completely exploded. The question is to be treated as a question of fact, and, like every other question of fact, when you are answering a presumption it may be answered by any evidence that is appropriate to the issue.

My Lords, that is not exactly the question which arises upon the objection taken here. The question is whether it is possible for a husband to be asked whether he had intercourse before marriage with the woman who afterwards became his wife. I confess I should be startled if I thought that that which appears to have been in the mind of Sir John Romilly at the time he gave the decision referred to could be held to be the law of England. Is it conceivable that a man taking to wife a person whom he imagined to be a pure virgin, and finding out that he had been deceived and that the woman was pregnant when he married her, should not be at liberty to say afterwards that, so far as he was concerned, he had every reason to believe

(1) 22 Beav. 481; 23 Beav. 273.

that she was a virgin; and that, having spurious issue put upon him, he should not be at liberty to say, "I never had intercourse with my wife before marriage"?

My Lords, I can only say for my own part, as regards the rule which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be inquired into in any Court of law, it would be a gross perversion of that principle to say that, under the circumstances which I have suggested, the husband should not be at liberty to prove his own virtue at all events, and to prove that he had not induced the woman whom he was afterwards to make his wife to be guilty of the sin of fornication.

My Lords, I can only say for myself that I do not admit the authority of the case which has been cited before Sir John Romilly. I think it is imperfectly reported, and there must be some confusion about the mode in which the question arose. But however that may be, I am of opinion that it is an authority which ought not to be followed, and I myself should regret very much that the principle wisely engrafted, as I think, into our law which protects the sanctity of the matrimonial relation, should be so perverted that an injured husband, who has been induced to marry an unchaste woman by the concealment of her condition, should not be at liberty afterwards to repudiate the wife who had so deceived him, and to prove by his own evidence that the spurious offspring sought to be put upon him was not his own.

My Lords, I should lament for the reputation of English law that it should be supposed that our jurisprudence sanctioned such an outrage upon reason and common sense as to reject such evidence.

My Lords, I submit to your Lordships that this evidence ought to be received.

LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY concurred.

The evidence was then admitted, and both claims were fully heard.

H. L. (E.) 1903 THE POULETT PEERAGE.

EARL OF HALSBURY L.C. My Lords, it appears to me that this case is singularly clear. The only question, indeed, which could arise on the subject would be whether or not the evidence given, which is now before your Lordships, is to be believed. If it is to be believed, there can be no doubt that this young man married this girl, whom he seems to have admired very much; that shortly after the marriage he discovered that she was already in the family way; and thereupon, according to his sworn testimony, he refused to have any further cohabitation with her.

The whole history of what takes place afterwards is only consistent with that story. Therefore I invite your Lordships, treating this as a question of fact to be heard as though it were before a jury, to believe the statement which has been thus made.

From the time that statement was made, and indeed from the earlier time when the separation took place, so far from there being any recognition by the family or the alleged father, or indeed any putting forward by the mother, there is an entire absence of it. And there is that which is proved to have taken place, namely, that before her marriage she admitted to her friend that she was in the family way by the officer named; that after the marriage she admitted to her husband that she was in the family way, and mentioned the same person as having been the father of the child of which she was then pregnant.

My Lords, from first to last, in the course of the whole case, there really has been nothing whatever which seems to me to cast a doubt upon the truth of the history set forth by the late Earl. The course of conduct pursued by him is that which one would have expected to be pursued when he found that he had been deceived into a marriage with a woman who was already pregnant. From first to last he refused to accept the suggestion that he was the father of the child; and I really am wholly unable to understand why there could be any doubt as to the necessary decision of this case when once the facts are ascertained. The facts seem to me to be all coherent and consistent with one hypothesis, and that is the one that

has been put forward in the sworn testimony of the alleged father.

My Lords, for these reasons it appears to me unnecessary to go minutely into the evidence. It is simply a question of fact. It seems to me that the facts as stated ought to be believed, and, if so, there is no doubt that the claimant under this marriage is illegitimate. If that be so, there is no doubt of the legitimacy and of the complete proof of the legitimacy and title of the other claimant; and I therefore move your Lordships that the Committee do report to the House that the claimant, the son of Elizabeth Lavinia Poulett, has not made out his claim, and that the other claimant has.

LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY concurred.

The Committee then resolved that the son of the first wife, William Turnour Thomas Poulett, had not made out his claim; and that the petitioner, Rosa, Countess Poulett, formerly the wife and now the widow of William Henry, sixth Earl Poulett, as testamentary guardian of her infant son William John Lydston, had made out her claim that the said William John Lydston Poulett should be declared to be by right entitled to the dignities, titles, and honours of Viscount Hinton of Hinton St. George and Earl Poulett.

Lords' Journals, July 24, 1903.

Solicitors: *G. H. Hall; Hammond & Richards; Solicitor to the Treasury.*

[HOUSE OF LORDS.]

H. L. (I.) 1903 Aug. 6.

THE LOCAL GOVERNMENT BOARD FOR IRELAND . . . . . } APPELLANTS;

AND

THE KING (AT THE PROSECUTION OF McKAY) . . . . . } RESPONDENT.

Poor-rate Collector (Ireland)—Transfer of Existing Officers to County Council—Scheme for Collection of Poor-rate—Remuneration—Local Government (Ireland) Act, 1898, *c.* 37, *s.* 115, *sub-ss.* 10–16, 18.

Sub-s. 18 of s. 115 of the Local Government (Ireland) Act, 1898, does not apply to poor-rate collectors transferred to a county council, at any rate so far as the fixing the amount of their remuneration is concerned. Provision for their remuneration is made by sub-s. 11:—

So *held* by the Earl of Halsbury L.C. and Lords Macnaghten, Davey, and Robertson, Lord Lindley dissenting.

The decision of the Court of Appeal (Ireland), [1902] 2 I. R. 637, reversed, and the order for the mandamus discharged.

AT the time of the passing of the Local Government (Ireland) Act, 1898, the relator McKay was poor-rate collector for the electoral division of Cootehill, in the county of Cavan, and deputy cess collector for two parishes in the same county. Under sub-s. 10 of s. 115 of the Act of 1898 the county council of Cavan framed a scheme by which the council proposed to employ McKay as poor-rate collector at a poundage rate of 10*d*. The Local Government Board for Ireland approved this scheme except as regarded the remuneration proposed to be allowed to McKay and another collector. McKay was employed by the council of Cavan in pursuance of the scheme. On August 1, 1901, McKay applied to the Board claiming that he should receive such increase of remuneration in proportion to increase of his duties as the Board might determine. In support of this claim he gave figures shewing that his duties were increased and his remuneration less. In September, 1901, the Board replied that, having regard to s. 115, sub-s. 11, of the Act, they were advised that the provisions of sub-s. 18

were not applicable to the case of poor-rate collectors, and on that ground refused to entertain McKay's claim.

McKay having obtained an order for a mandamus which was made absolute, a writ was issued. The writ, after reciting (inter alia) that McKay's duties had been increased, and that no special agreement within sub-s. 18 of s. 115 had been made between him and the Cavan County Council respecting the terms and conditions on which he might continue to hold his office and the remuneration he should receive, commanded the Board to hear and determine his claim to increased remuneration for increased duties, and to proceed to determine the increase of remuneration which he should receive in proportion to the increase of his duties under the Act of 1898. The Board returned to this writ (1.) that McKay was not an existing officer transferred under s. 115 of the Act who since the coming into operation of the Act and subject to the provisions thereof had held his office by the same tenure and upon the same terms and conditions as theretofore; (2.) that he was not entitled to receive such increase of remuneration in proportion to the increase of his duties as the Board might determine, inasmuch as he was an officer who had been employed under a scheme submitted to the Board by the Cavan County Council in pursuance of s. 115, sub-s. 10, of the Act, which had been provisionally approved of by the Board; (3.) that McKay was not a transferred existing officer to whom the provisions of sub-s. 18 of s. 115 applied, and that the Board was not bound to hear and determine his claim for increased remuneration in respect of his increased duties. McKay joined issue on the return, and objected that it was bad in law. The case was tried by Wright J., who gave judgment for McKay, and directed a peremptory mandamus to issue. This decision was affirmed by the King's Bench Division (Ireland), Lord O'Brien C.J. and Gibson J., and their decision was affirmed by the Irish Court of Appeal, Lord Ashbourne L.C., FitzGibbon, Walker, and Holmes L.JJ. (1) Holmes L.J. held that sub-s. 18 of s. 115 did not apply to rate collectors transferred to a county council, but, being of opinion that McKay

(1) [1902] 2 I. R. 637.

H. L. (I.) 1903 LOCAL GOVERNMENT BOARD FOR IRELAND v. REX.

had an undoubted grievance, and that the substantial question was whether his work could be indefinitely increased without any increase of remuneration, did "not dissent from a judgment which will probably have the effect of relieving McKay from the injustice under which he has hitherto been suffering."

From these decisions the Board brought the present appeal.

March 16, 17, 19. *Campbell, S.-G.*, and *Chambers, K.C.* (*R. Manders* with them (Irish Bar)), for the appellants. The remuneration of poor-rate collectors transferred to a county council does not fall under the provisions of sub-s. 18 of s. 115 of the Local Government (Ireland) Act, 1898. It falls under sub-ss. 10–16, and particularly sub-ss. 11 and 15, which deal with the scheme to be framed by the county council, the remuneration to the existing officers employed under the scheme, and the approval of the scheme by the Local Government Board, with or without modifications. The mandamus issued to the Board is framed under sub-s. 18, and is therefore inapplicable; the Board not being bound to hear and determine McKay's claim under sub-s. 18 for an increase of remuneration in proportion to the increase of his duties.

Healy, K.C., and *Henry Maxwell* (Irish Bar), for the respondent. The Act has made an enormous difference in the position of the poor-rate collector, his duties being largely increased. Inter alia he calls upon more ratepayers and more often, and he has onerous duties in connection with the registration of voters. McKay will suffer a grievous injustice if his claim is disallowed. Sub-s. 18 must be read together with the preceding sub-sections of s. 115. Sub-s. 10 contemplates that sub-s. 18 applies to such a case, and there is nothing in the other sub-sections to prevent the construction of sub-s. 18 according to the ordinary and natural meaning of the words which give the Local Government Board express power to determine what increase or diminution of remuneration in proportion to the increase or diminution of his duties the collector shall receive. All these sub-sections are alike grouped under that most pregnant heading, "Existing Officers." Without sub-s. 18 there is no security for tenure of office,

conditions of service, or adequacy of remuneration. The refusal of the Board is based on an erroneous ground.

Campbell, S.-G., in reply.

The House took time for consideration.

Aug. 6. EARL OF HALSBURY L.C. My Lords, I am content to take the view expressed by Holmes J. as to McKay's right, and I share his views that there has been an injustice suffered by him in the absence of proper provision made for him, whatever that provision ought to have been.

I think the learned judge has pointed out with great precision the reasons why sub-s. 18 of s. 115 of the Act of 1898, under which this writ of mandamus has been framed, does not apply; but I am much surprised that the learned judge concludes his very lucid judgment by a suggestion that the form of the writ is one which can be altered to suit what, upon the return, may be considered the justice of the case.

My Lords, I cannot at all assent to any such view. The writ of mandamus cannot be so used. The thing sought to be enforced by that writ must be distinctly pointed out, and, if the return is insufficient, the course of procedure is, and must be, the issue of a peremptory mandamus which must follow the terms of the original writ, and if the learned judge to whom I refer is right, as I think he is, it would be absolutely impossible to alter the form of the writ. It is not a question of technicality or mere form. The duty sought to be enforced must be as a matter of substance and not form definitely ascertained, and its performance definitely demanded and refused.

The Solicitor-General for Ireland pointed out in his very able argument the contradiction between the reasoning of the judgment and the conclusion. If the appellants made a return that they had complied with the mandamus they would, by such return, be shewing that they had done what it was unlawful for them to do, and yet they would be liable to fine and imprisonment if they refused.

I move your Lordships that the order for the writ of mandamus be reversed.

H. L. (I.) 1903 LOCAL GOVERNMENT BOARD FOR IRELAND v. REX.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I have had an opportunity of reading and considering in print the judgment of my noble and learned friend Lord Davey, and I only desire to express my entire concurrence in it.

LORD DAVEY. My Lords, I am of opinion that Holmes L.J. has put the right construction on s. 115 of the Local Government (Ireland) Act, 1898. The learned Lord Justice was of opinion that the 18th sub-section does not apply to rate collectors transferred to a county council, and his reason for coming to that conclusion was that the status and right of those officers have been already exhaustively dealt with by ss. 10 to 16 inclusive. I think that the majority in the Court below have not given sufficient attention to the words "Subject to the provisions of this Act" at the commencement of sub-s. 18. The rate collectors are, it is true, existing officers transferred under s. 115, and are not in terms excluded from the operation of sub-s. 18; but the point seems to me to be that other provisions are made by the Act respecting their tenure of their offices, and the terms and conditions upon which they hold them, and as to the remuneration to which they are entitled. Their remuneration is to be dealt with by the scheme in the manner provided by sub-s. 11, and the tenure, terms, and conditions of their offices are determined by sub-s. 15, by which it is provided that they shall be deemed to be poor-rate collectors appointed (not merely employed, but appointed) by the council. If their remuneration has not been adequately dealt with by the scheme in accordance with sub-s. 11, the Local Government Board may either send the scheme back to the county council for reconsideration, or may introduce such modifications into it as will bring it into compliance with the Act.

It appears to me that a rate collector (using that expression in its widest sense) who was an existing officer at the date of the transfer of powers effected by the Act had his option whether he was willing to serve the new authority or was not willing to do so. In the latter case he is entitled to a gratuity under sub-s. 12 (*b*) and (*c*). If he should be willing to serve, the county council may, or may not, desire to employ him.

If he be not continued as an officer of the county council, he is entitled to compensation under sub-s. 12 (*a*). But if his services are to be retained, the county council is bound to include his name in their scheme and allot him a remuneration assessed in accordance with sub-s. 11. When the scheme has been finally settled and approved, the officer's remuneration is determined, and (as I have said) his tenure also is determined by sub-s. 15. I am of opinion that s. 83, sub-s. 6, applies to the rate collector in such a case, notwithstanding that by sub-s. 14 it is provided that s. 83 shall be "without prejudice to the provisions of this Act respecting existing officers."

The question of McKay's tenure of his office, however, is not directly before your Lordships, and even if my view as to the effect of sub-s. 15 of s. 115 and s. 83, sub-s. 6, taken together is unfounded, it will not affect the decision of this case. For it may well be that sub-s. 18 may regulate the tenure of the office of transferred rate collectors if there is no other provision of the Act which does so, but will not apply to their remuneration for which other provision is made. I am of opinion that every possible case is exhausted and provided for, and no room is left for the application of sub-s. 18 to transferred rate collectors, at any rate so far as the fixing of the amount of their remuneration is concerned. Mr. Healy contended that the rate collectors have other duties to perform in connection with the registration of voters. The Solicitor-General replied that their remuneration for those services was otherwise provided for by the Act. Whether this be so or not, the point does not appear to me to affect the question brought under the consideration of your Lordships by this appeal, which relates only to the remuneration of the rate collector as such.

In the present case the county council included Mr. McKay's name in their scheme submitted to the Local Government Board, and assessed his remuneration at a poundage rate of 10*d*. The Local Government Board approved the scheme except as regards the rate of remuneration proposed to be allowed to two collectors (Brady and McKay). The Board

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made no modification of their own in the scheme, but suggested that the county council should submit an amended scheme. This the county council has not done, and consequently no scheme approved by the Local Government Board exists as regards McKay, and his duties and remuneration have never been fixed in accordance with the Act. But the county council has continued to employ him and has paid him remuneration which he considers inadequate, and has received under protest and as paid on account. I regard this employment of Mr. McKay as a temporary expedient only pending the proper determination of his duties and remuneration by scheme, and I do not think that the county council has ever definitively elected to employ him.

While agreeing with Holmes L.J. in his opinion on the construction of the Act, I cannot agree in his conclusion. The Lord Justice seems to have thought that McKay had a grievance (in which I agree with him), and that his grievance might be remedied if the mandamus was granted. I do not think a mandamus can be granted to compel the appellants to exercise the powers of s. 18 in the prosecutor's favour, which is what is asked, and when the matter is once before the judge the rights of the parties must be decided according to law. But the Local Government Board is not a Court of law or bound by any strict rules of procedure, and the Board, I think, might have applied the proper remedy to the grievance complained of. I think it is unfortunate that the Board, instead of peremptorily rejecting McKay's application of August 1, 1901, did not look at the substance of the matter. They might then have called upon the county council to submit an amended scheme, or in default of the county council doing so have made such modifications (if any) in the scheme (which was still before the Board) as might be required in order to provide remuneration for McKay in accordance with sub-s. 11. This seems to me the proper and only remedy for McKay's grievance, for in my opinion the only way in which his remuneration can be determined consistently with the Act is by way of scheme. And whether his claim be exaggerated or not (on which I pass no opinion) he is entitled, if the county council continue to

employ him, to have his remuneration so determined. Whether there is any legal machinery by which either the county council or Local Government Board can be compelled to do what is necessary for that purpose I do not know. It may be that McKay's only remedy is to refuse any longer to serve and claim compensation under sub-s. 12 (*a*) on the ground that he is not continued by the scheme as an officer.

I think the order for mandamus must be discharged; but I should be very glad if your Lordships could see your way to relieving McKay of any costs, as I think the whole difficulty has been occasioned by the unfortunate attitude of the Local Government Board.

LORD ROBERTSON. My Lords, I entirely agree in the motion which has been made by my noble and learned friend on the Woolsack. The arguments of Holmes L.J. are to my thinking conclusive against the mandamus.

LORD LINDLEY. My Lords, the question whether s. 115, sub-s. 18, of the Irish Local Government Act, 1898, is applicable to this case is one of great difficulty; and personally I am not satisfied that the Courts in Ireland have decided that question erroneously. Be this as it may, I am clearly of opinion that the mandamus which has been granted cannot be supported.

If the construction of the Act adopted by Holmes L.J. and by the rest of your Lordships is correct (as it must now be taken to be), i.e., if s. 115, sub-s. 18, is not applicable to this case, the mandamus to enforce compliance with that clause has obviously no basis on which it can rest.

But even on the assumption that sub-s. 18 is applicable I am unable to discover grounds for upholding the mandamus. On this assumption the duty of the Local Government Board to determine the proper sum payable to Mr. McKay in respect of his duties can be performed either by making an order under sub-s. 18 or by approving a proper scheme. A demand to perform that duty and a refusal to perform it in one of these two ways, namely, by making an order under s. 115,

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sub-s. 18, are I think proved by the correspondence. But there has been no demand or refusal to perform it in the other way, namely, by approving a proper scheme. Nor is there any impossibility in now adopting that course. Where, however, a statutable duty can be performed in one of two ways at the option of the person who has to perform it, the authorities shew that a mandamus to perform it in one of those ways ought not to be granted in the absence of a distinct refusal to perform it in the other way as well, if that be still possible. This was settled by your Lordships' House in *Reg.* v. *Directors of the South Eastern Ry. Co.* (1)

On these grounds I have reluctantly come to the conclusion that the mandamus which has been issued ought not to have been granted, and that the appeal should therefore be allowed. But it is in my opinion not a case for making the respondent pay the costs; for the Local Government Board might long ago have settled all disputes by approving the scheme submitted to them with such modifications as they considered right.

Order of the Court of Appeal in Ireland and judgment of the King's Bench Division reversed: cause remitted.

Lords' Journals, August 6, 1903.

Solicitors: *Holmes, Greig & Greig, for T. T. Mecredy & Son, Dublin; Jackson, Beard & King, for Samuel Jones, Dublin.*

(1) (1853) 4 H. L. C. 471.

[HOUSE OF LORDS.]

BEYFUS AND ANOTHER . . . . . APPELLANTS; H. L. (E.) 1903 Aug. 6.

AND

LAWLEY AND ANOTHER . . . . . RESPONDENTS.

Power of Appointment—General Testamentary Power—Exercise—Covenant to exercise Power as Security for Loan—Liability of Appointed Fund for Debts.

The donee of a general testamentary power of appointment over a fund borrowed money and as security covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund and that he would not revoke the will. He made a will accordingly and died:—

Held, that the lender was not entitled to priority as regards the fund over the appointor's general creditors; for personalty appointed by will under a general power is subject to the payment of the appointor's debts, as declared by Knight Bruce L.J. in *Fleming* v. *Buchanan*, (1853) 3 D. M. & G. 976, 980.

The decision of the Court of Appeal, *In re Lawley, Zaiser* v. *Lawley*, [1902] 2 Ch. 799, affirmed.

THE Hon. F. C. Lawley under the will of Lady Wenlock had a general power to appoint by will 10,000*l.* which in default of appointment was to go as part of her residuary estate. By a mortgage of April 7, 1892, to secure a loan of 1000*l.* and interest he covenanted that he would immediately after the execution thereof sign his will of even date already prepared, whereby in exercise of the general power under Lady Wenlock's will he appointed that the trustees of her will should stand possessed of the 10,000*l.* and the investments representing it, upon trust to pay to the mortgagee thereout, in preference and priority to all other payments, the 1000*l.* and interest, and that he would not revoke or alter his will without the consent of the mortgagee. The same day he executed his will containing the above provisions and stating that it was his wish that the loan should be a first charge on the 10,000*l.* On his death in 1901 the 1000*l.* with interest was still due. The

H. L. (E.) 1903 BEYFUS v. LAWLEY.

question then arose in an administration action whether the executors of the deceased mortgagee were entitled to priority as to the trust fund over other creditors of Mr. Lawley. Joyce J. held that they had not priority, and this decision was affirmed by the Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy L.JJ.). (1)

The mortgagee's executors appealed.

July 21; Aug. 6. *Badcock, K.C.* (*Edward Ford* with him), for the appellants, contended that the mortgagee was not a volunteer or gratuitous donee, but had given valuable consideration for the appointment. He was entitled under a covenant for a breach of which the appointor's estate would have been liable in damages. The precise question had never previously been raised, as the rule in *Fleming* v. *Buchanan* (2), relied upon by the Court of Appeal, had hitherto been applied only when the power of appointment had been exercised in favour of volunteers in the strict sense of gratuitous appointees. [He cited the authorities which are fully set forth in the report below.]

Hughes, K.C., and *Henry Wace*, for the respondents, Mr. Lawley's executors, were not heard.

EARL OF HALSBURY L.C. My Lords, your Lordships have listened to a very protracted argument in this case, and the only answer I have to give to that argument is that whatever merits it might have had half a century ago, it is too late now. The language which was used by Knight Bruce L.J. in *Fleming* v. *Buchanan* (2) is in accordance with the opinions delivered by each of the three learned Lords Justices of Appeal, and beyond some abstract reasoning which, as it appears to me, would get rid of the rule altogether, I have seen no reason to think that the judgment of the Court of Appeal is wrong.

I content myself with saying that in view of that language of Knight Bruce L.J., which has not been challenged for half a century, this appeal against the decision of the Court of

(1) [1902] 2 Ch. 799. (2) 3 D. M. & G. 976, 980.

Appeal is hopelessly unarguable, and therefore I invite your Lordships to dismiss the appeal with costs.

LORD MACNAGHTEN. My Lords, I agree. I am of opinion that the passage from the judgment of Knight Bruce L.J. in *Fleming* v. *Buchanan* (1), which has been so often quoted in this case, is an accurate statement of the law on the subject, and that it does not require any qualification as Vaughan Williams L.J. seems to suggest. Whatever the origin of the rule may have been, it is in my opinion much too late to question it now or to attempt to cut it down.

LORD LINDLEY. My Lords, I am of the same opinion. The doctrine that an appointee under a power derives title from the instrument conferring the power and not from the appointment is well established; but a qualification or exception has been long grafted upon it and is equally well established. For it cannot now be denied that property appointed by will under a general power is assets for payment of the debts of the appointor, and is not regarded as property of the donor of the power distributable by the donee thereof.

The property appointed is in such a case treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him. When I say assets I do not mean general assets, but assets nevertheless applicable to the payment of the appointor's debts after all his own property has been exhausted. Again, personal property appointed by will under a general power although not a legacy for all purposes is treated as personal estate bequeathed by him.

It is settled that, except by making a creditor an executor, a person disposing of his own property by will cannot by his will prefer one creditor to another or make a gift by will payable before a debt. A covenant to bequeath property by will does not alter the character of the property bequeathed in accordance with the covenant. What is so bequeathed is still a gift by will and not a preferential debt. The attempt to

(1) 3 D. M. & G. 976, 980.

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confine the rule to volunteers cannot, I think, now be supported when speaking of powers to appoint by will.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, August 6, 1903.

Solicitors: *Beyfus & Beyfus; Dangerfield & Blythe.*

[HOUSE OF LORDS.]

H. L. (E.) 1903 *Aug.* 6.

TOLHURST . . . . . APPELLANT;

AND

THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED } RESPONDENTS.

TOLHURST . . . . . APPELLANT;

AND

THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED, AND THE IMPERIAL PORTLAND CEMENT COMPANY, LIMITED . . } RESPONDENTS.

Contract—Assignability—Contract to supply Goods to Company—Assignment of Contract—Liquidation of Company—Rights of Contracting Company and Assignee—Joinder of Assignor in Action.

The appellant, owner of chalk quarries, made a contract with the Imperial Portland Cement Company, Limited, by which it was agreed that he would for fifty years supply to the company and that the company should take and buy from him at least 750 tons of chalk per week at a certain price, and so much more (if any) as the company should require for the whole of their manufacture of Portland cement upon their land near the quarries. The Imperial Company afterwards assigned the contract and sold its undertaking, land, works, and business to the Associated Company, Limited, and went into voluntary liquidation, its affairs being wound up and its assets distributed:—

Held (by Lords Macnaghten, Shand, and Lindley, the Earl of Halsbury L.C. doubting and Lord Robertson dissenting), that upon the true construction of the contract it must be read as if it had been expressed to be made with the Imperial Company, its successors and assigns, owners and occupiers of the works; that the Associated Company was entitled to

the benefit of the contract, and could enforce it by action without joining the Imperial Company as plaintiffs.

The decision of the Court of Appeal, [1902] 2 K. B. 660, affirmed, except on the question of joining the Imperial Company.

In January, 1898, the appellant made a contract with the Imperial Company, the effect of which is stated in the head-note. Fuller details are given in Lord Macnaghten's judgment.

In 1900 the Imperial Company assigned the contract and sold its undertaking, land, works, and business to the Associated Company, gave the appellant notice thereof, went into voluntary liquidation, and ceased to carry on business. After correspondence the appellant brought an action against the Associated Company claiming a declaration that the appellant was not bound to carry out the contract of January, 1898, with that company in substitution for the Imperial Company. Then the Associated Company and the Imperial Company jointly brought an action against Tolhurst claiming a declaration that the contract of January, 1898, was valid, subsisting, and binding upon him, and that the Imperial Company was entitled to be supplied by him with chalk in accordance with the contract. Mathew J., who tried both actions, gave judgment in both for Tolhurst. (1) The Court of Appeal (Collins M.R., Sir F. Jeune and Cozens-Hardy L.J.) reversed these decisions and gave judgment for the Associated Company in the action brought by Tolhurst. In the action in which Tolhurst was defendant the Court of Appeal entered judgment for the plaintiffs for a declaration that the contract of January, 1898, was a subsisting, valid, and binding agreement between the Imperial Company and the defendant. (2) Against both these decisions Tolhurst brought the present appeals.

July 7, 13. *Pickford, K.C.*, and *George Wallace*, for the appellants. The Imperial Company having given Tolhurst notice that they had assigned the contract and sold the land and works and business, thereby gave him notice that they had rescinded the contract, and left him free from it. The contract is from its nature confined to the parties to it. Tolhurst did

(1) [1901] 2 K. B. 811. (2) [1902] 2 K. B. 660.

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not agree to supply any and every company with all the chalk it required. His obligation was only to supply the Imperial Company with at least 750 tons per week, and so much more (if any) as "*the* company shall require for the whole of *their* manufacture upon *their* said land." That contract is in terms confined to the Imperial Company. The requirements of the Associated Company may and probably will be much more onerous than those of the Imperial Company. It has a much larger capital and business than the Imperial Company ever had. It is no answer to say that the Imperial Company might have increased its business and its capital. The requirements contemplated were those of the Imperial Company and those only.

Younger, K.C., and *A. M. Bremner* (*H. E. Wright* with them), for the respondents, contended that the decisions of the Court of Appeal were right for the reasons there given and referred to: *British Waggon Co.* v. *Lea.* (1)

Pickford, K.C., in reply.

The House took time for consideration.

Aug. 6. EARL OF HALSBURY L.C. My Lords, in this case I confess that during a very considerable period of the argument I was of opinion that the judgment originally given by Mathew J., as he then was, was right, and that this contract was not assignable. The circumstances which have induced me to change the view I originally entertained are the length of duration of the contemplated contract, the persons engaged in it, and the nature of the contract itself. I quite agree that the fact of the word "assigns" not being in the contract is immaterial if it is ascertained that the intention of the contract is that it should be assigned. Under these circumstances I acquiesce in the judgment which is intended to be moved by my noble and learned friend Lord Macnaghten, but it is with very great hesitation.

LORD MACNAGHTEN. My Lords, I cannot think that any legal principle is involved in this case. The case may be of

(1) (1880) 5 Q. B. D. 149.

great importance to the parties. From a legal point of view it is, I think, of no importance at all. The question, as it seems to me, depends simply and solely on the true meaning and effect of the contract of January 5, 1898, made between Alfred Tolhurst of the one part and the Imperial Portland Cement Company, Limited, of the other. Two alternative constructions have been proposed. One follows the letter of the instrument and adheres to it closely; the other favours a more liberal interpretation, supplying, it is said, nothing more than what is required in order to carry out the obvious intention of the parties. The question is, which of these two constructions is to be adopted? When that matter is once determined, there cannot, I think, be any further difficulty. There are contracts, of course, which are not to be performed vicariously, to use an expression of Knight Bruce L.J. There may be an element of personal skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions. But no one, I suppose, would seriously argue that a contract for delivery of chalk from particular quarries for the use of particular cement works cannot be performed by any person for the time being possessed of the quarries, or that it can make the slightest difference to anybody who the proprietors of the cement works or the actual manufacturers may be, provided they are in a position to carry out the terms of the original contract.

Tolhurst was the owner of property at Northfleet, in Kent, containing extensive and valuable chalk quarries. He sold a piece of his land there known as the Little Dockyard to the Imperial Company, and that company bought another piece of land from the British White Lead Company, who also derived title from Tolhurst. The main object for which the Imperial Company was formed was to establish cement works at Northfleet and carry on there the business of Portland cement manufacturers. It was, of course, important for Tolhurst to secure a regular market for his chalk, and it was equally important for the Imperial Company to secure a regular supply of chalk for their works.

The effect of the contract of January, 1898, may be stated

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shortly. Tolhurst had made a tramway to the boundary of the land bought by the Imperial Company from the White Lead Company, and the Imperial Company was to make a tramway continuing Tolhurst's tramway to a convenient spot in its land in order to enable him to bring chalk to the company's works. On completion of this tramway the contract provides by clause 2 that "the said Alfred Tolhurst will, for a term of fifty years, to be computed from the 25th day of December, 1897, or for such shorter period (not being less than thirty-five years) as he shall be possessed of chalk available and suitable for the manufacture of Portland cement, and capable of being quarried and got in the usual manner above water level, supply to the company, and the company will take and buy of the said Alfred Tolhurst at least 750 tons per week, and so much more, if any, as the company shall require for the whole of their manufacture of Portland cement upon their said land." Tolhurst was to provide rolling stock and traction power, carry the chalk over the company's tramway, and deliver it alongside the company's stores, but he was not to be precluded from supplying other persons. Delivery orders were to be sent in before 4 o'clock for the next day. The price was to be 1*s.* 3*d.* per ton, to be paid in cash monthly. The average monthly payment for any year after 1898 was to be not less than 188*l.* Then there was a clause providing for the case of strikes and unavoidable stoppages, and authorizing the company at its own expense to procure chalk elsewhere in the event of Tolhurst being thereby prevented from supplying the quantity required.

In 1900 the Imperial Company sold its undertaking to the respondents, the Associated Company, and went into voluntary liquidation. Its affairs are fully wound up and all its assets have been distributed. Tolhurst brought in no claim in the liquidation. He stood by while the Imperial Company was in process of dissolution.

Tolhurst's case now is that by parting with its undertaking and going into liquidation the Imperial Company rescinded or put an end to the contract of January, 1898, and that he is not bound under or in accordance with that contract to furnish

supplies of chalk to the Associated Company for the purposes of the works at Northfleet which formerly belonged to the Imperial Company, whether the Associated Company requires delivery in its own name or in the name of the Imperial Company.

Now what is the meaning of the contract of January, 1898? I cannot think there is much difficulty about it. It is expressed to be made between Alfred Tolhurst and the Imperial Company. They, and they only, are named as the persons to perform the contract. From beginning to end of the instrument, if the contract be taken literally, there is not one word pointing to the continued existence of the contract in the hands of any other person, either by succession or substitution. The obligations and benefits of the contract on the one side begin and end with Alfred Tolhurst; on the other, they begin and end with the Imperial Company. And yet the contract is to endure for the period of fifty years, or if the supply of chalk in the quarries does not hold out so long, it is to last for thirty-five years at least. Now, when it is borne in mind that the Imperial Company must have been induced to establish its works at Northfleet by the prospect of the advantages flowing from immediate connection with Tolhurst's quarries, and that the contract in substance amounts to a contract for the sale of all the chalk in those quarries by periodical deliveries (less what Tolhurst might sell elsewhere), it is plain that it could not have been within the contemplation of the parties that the company would lose the benefit of the contract if anything happened to Tolhurst, or that Tolhurst would lose the benefit of the market which the contract provided for him at his very door in the event of the company parting with its undertaking, as it was authorized to do by its memorandum.

Mr. Pickford said, and said truly, that those powers in the memorandum to which his attention was called placed the company in the position of an individual. That is so; but if the contract had been made between two individuals—between Alfred Tolhurst and John Smith—I do not think there would have been any doubt about the matter. It is, I think, the introduction of a company—a body with perpetual succession,

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defined capital, and specified objects—as one party to the contract that really creates or rather suggests the difficulty—that and the use of the words "their," "their manufacture," "upon their land." But the word "their" in the case of the company must not be taken too literally any more than the word "his" in the case of Tolhurst, where the contract speaks of "his" land. Something more is comprehended than the particular company and the individual Tolhurst. It seems to me that the contract is to be read and construed as if it contained an interpretation clause saying that the expression "Tolhurst" should include Tolhurst and his heirs, executors, administrators and assigns, owners and occupiers of the Northfleet quarries, that the expression "the company" should include the company and its successors and assigns, owners and occupiers of the Northfleet Cement Works, and that the words "his" and "their" should have a corresponding meaning. That, I think, was the plain intention of the parties. The contract is a contract for the mutual benefit and accommodation of the chalk quarries and the cement works, and of Tolhurst and the company as the owners and occupiers of those two properties. Construed fairly, the provision in clause 2, about which there was so much argument, means, I think, nothing more than this—that the Imperial Company was to take the whole of the supply of chalk required for the Northfleet works (the quantity to be ascertained by daily orders, but guaranteed not to be less than 750 tons per week), from Tolhurst's chalk quarries and from no other source whatever. As long as that is done, how can it matter who is carrying on the works? There is nothing in the contract to restrict the development of the works on the land which formerly belonged to the Imperial Company, or to check the expansion and improvement in the ordinary course of things of the process of manufacture there.

If the view I have expressed be correct, all difficulty vanishes. It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee. The assignor ought in ordinary circumstances to be made a party. But I cannot think that this is necessary when the assignor is a mere name, as the Imperial Company is in the

present case, without any means and without any executive or board of directors, if indeed it has now any corporate existence at all. I am not aware of any authority for this proposition, but it seems to me to be in accordance with the practice in equity, and it is supported by what was said by James V.-C. in *Castellan* v. *Hobson*. (1)

The result is that Tolhurst's action fails, because, as regards the chalk which has been supplied to the Associated Company, the company is entitled to have it at the stipulated price of 1*s*. 3*d*. per ton. The second action succeeds, but I think the Imperial Company was not a necessary or proper party. If the requirements of ss. 142 and 143 of the Companies Act, 1862, have been complied with, the company is "deemed to be dissolved," and, therefore, I should suggest that in lieu of the declaration in the order pronounced by the Court of Appeal there should be inserted a declaration to the effect that the Associated Company is entitled to the benefit of the contract of January 5, 1898, they paying, as provided by the contract, for all chalk supplied to them in accordance with the contract.

With this variation I think the orders under appeal should be affirmed and the appeal dismissed with costs, and I move your Lordships accordingly.

My noble and learned friend Lord Shand, who is unable to be present to-day, has asked me to express his concurrence in this opinion.

LORD ROBERTSON. My Lords, I can explain in a few sentences what I find an insuperable objection to the judgment appealed against. It seems to me that the demand of the respondents is that the appellant should supply them with something different to that which he bound himself to give. The subject-matter of the contract is expressed to be the supply of 750 tons and so much more chalk, if any, as should be required for the business of a particular company, while the demand of the respondents is that the appellant shall supply 750 tons and so much more chalk as is required for the business of another and a different company. The appellant's

(1) (1870) L. R. 10 Eq. 47.

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point is, therefore, not the bare one that the contract is not transmissible, but it is that the thing which the assign is asking for is something which the appellant never bound himself to give.

Now, first of all, about the facts. It is true, or at least I assume it to be true, that the original company still exists in such sense that it can sue. But it is still more certain that it has finally ceased business; and it exists and comes into Court solely in order to enforce this contract (if it can) in favour of the new company. And the crucial fact (in my view) is that the original company is, as a manufacturer, dead and done with, and has no requirements large or small. The requirements which the appellant is now called on to meet are not the requirements of the old company, but the requirements of the new.

It seems to me to be no answer to this to say that the old company might have increased its capital and its operations, so that its requirements would have been as onerous as those of the new company. This is merely the old and often rejected argument that a man can be forced to do something which he never agreed to merely because it is very like and no more onerous than something which he did agree to.

I have only to add that I should find it impossible to split up the subject of the contract, and to hold that even if the appellant is not bound to meet the requirements of the new company, he is bound to give them the 750 tons. In a commercial contract like this, the benefit of the more elastic provisions belongs to both parties, and neither the person who supplies nor the person who takes can be held to the one part of the contract when the opposite party has by his own act rendered the other part of the contract impossible of fulfilment.

LORD LINDLEY. My Lords, in January, 1898, Mr. Tolhurst, who was the owner of some chalk land in Northfleet, sold part of that land to the Imperial Portland Cement Company, and by an agreement dated January 5, 1898, he agreed that they should have for fifty years from his adjoining chalk quarries all such chalk as they should require for their cement works on

the land they had bought. They were to pay 1*s.* 3*d.* a ton for all they wanted, and they bound themselves to take at least 750 tons a week. The company were not to come on to Tolhurst's land and get the chalk themselves. He was to get it and deliver it to them, and they were to pay him monthly for what was so delivered. Mr. Tolhurst was at liberty to sell chalk to other persons, and provision was made for the possible event of all his chalk being worked out before the expiration of the fifty years.

The nature of the agreement and the time it was to last negative the idea that it was confined to the parties to it. The word "assigns" does not occur in the agreement. But this does not shew that the benefit of the contract is not assignable. An agreement for a lease, and even an option to require a lease or a renewal of a lease, is assignable in equity even although there is no mention of executors, administrators, or assigns: see *Buckland* v. *Papillon.* (1)

My Lords, if the above agreement had been with an ordinary individual his interest would, on his death, have passed to his executors or administrators; or if he had become bankrupt, his trustees could have claimed it and have sold it for the benefit of his creditors. It follows that on the same supposition he could have assigned such interest in his lifetime. The Imperial Company could, in my opinion, have done the same thing; they could have assigned their interest themselves, before winding-up proceedings commenced, and their liquidators could have assigned it as part of their assets afterwards.

But it is necessary to look a little further, and see what limit is set to the right conferred by the agreement. The Imperial Company were not entitled to an unlimited supply of chalk, but only to so much as they might want for making cement on their own piece of land. I do not think their right to have chalk from Tolhurst's quarries could be assigned apart from their own land and cement works. The Imperial Company could not by alienation or otherwise increase the burdens which Mr. Tolhurst undertook to bear. But this is the only limit which I can find in the present case.

(1) (1866) L. R. 1 Eq. 477; 2 Ch. 67.

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Mathew J. thought that the mere fact that the Imperial Company was a comparatively small company and that the Associated Company was much larger, and would or might want more chalk than the other, involved a material increase in the burden thrown on Mr. Tolhurst. But the learned judge apparently overlooked the fact that the Imperial Company could have increased its capital to any extent, and could have increased its cement works to any extent which the land they had bought from Mr. Tolhurst could carry. The limit of the burden thrown on Mr. Tolhurst is in any case measured by this consideration, and this limit can no more be passed by the Associated Company than by the Imperial Company.

But then Mr. Pickford, in his very able argument, relied on the words "as the company shall require for the whole of their manufacture of Portland cement upon their said land." By throwing a strong emphasis on the words "the company" and "their," the impression may be produced that these words, which plainly refer to the Imperial Company, were purposely used to exclude all other persons. But I cannot think that these expressions indicate any such intention. There is no question here of any personal confidence or personal skill. There is no reason whatever for supposing that any personal element entered into the mind of either of the parties to the agreement, and I cannot find anything in it to prevent the Imperial Company from assigning the benefit of it to any other company or to any individual. By so assigning it the Imperial Company would not get rid of their obligations to Mr. Tolhurst; but the contract is one the benefit of which is assignable in equity quite independently of the Judicature Acts. The Judicature Act, 1873, s. 25, clause 6, has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own names without joining the assignor. I cannot agree with the Court of Appeal in thinking that the Associated Company could not sue Mr. Tolhurst on this contract without joining the Imperial Company as co-plaintiffs. The supposed necessity of making them parties or of postponing their dissolution to enable the Associated Company to sue as their assignees

has, I think, obscured the true position of the parties. I see no such necessity. But the joinder of the Imperial Company, although unnecessary, has not increased the costs and need not be further noticed.

If Mr. Tolhurst has any provable claim against the Imperial Company, and if he is not too late, he can prove against it, and the liquidators can, if necessary, obtain the means of paying him from the Associated Company under their indemnity.

In conclusion, I will only add that the *British Waggon Co.* v. *Lea* (1) was, in my opinion, rightly decided, and is an authority very much in point for the Associated Company. The contract there was held assignable although the word "assigns" did not occur.

The appeal fails, and the order of the Court of Appeal should be affirmed with costs; but the formal order of the Court of Appeal will, I think, be improved, if amended as suggested by Lord Macnaghten.

In the action brought by Tolhurst order of the Court of Appeal affirmed and appeal dismissed with costs.

In the action brought against Tolhurst order of the Court of Appeal affirmed with the variation suggested in Lord Macnaghten's judgment; appeal dismissed with costs.

Lords' Journals, August 6, 1903.

Solicitors: *Sismey & Cook, for Tolhurst, Lovell & Clinch, Gravesend; Ashurst, Morris, Crisp & Co.*

(1) 5 Q. B. D. 149.

[HOUSE OF LORDS.]

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THE BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891), LIMITED } APPELLANTS;

AND

THE PONTYPRIDD WATERWORKS COMPANY . . . . . } RESPONDENTS.

Mines—Waterworks—Notice to prevent Working of Mines—Compensation—Arbitration—Rise in Value of Minerals—Evidence—Waterworks Clauses Act, 1847, *c.* 17, *ss.* 6, 22–25—*Lands Clauses Acts.*

Owners of coal mines under and near waterworks gave the undertakers notice under s. 22 of the Waterworks Clauses Act, 1847, that they intended to work the coal. The undertakers replied by a counter-notice requiring the mine owners not to work and stating their willingness to make compensation. In an arbitration under the Act and the Lands Clauses Acts to assess the compensation the mine owners gave evidence to prove that coal rose in value after the date of the counter-notice:—

Held, that there was no purchase of the coal or transfer of the property in the coal; that the inquiry was not what was the value of the coal at the date of the counter-notice, but what would the coal owners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it; and that the evidence was admissible.

The decision of the Court of Appeal, [1902] 2 K. B. 135, reversed, and the decision of Ridley and Phillimore JJ., [1901] 2 K. B. 798, restored.

THE following statement of facts is in substance taken from Lord Macnaghten's judgment.

The appellants, owners of coal seams under and near the Pontypridd Waterworks, in September, 1898, gave the respondents notice under s. 22 of the Waterworks Clauses Act of 1847 that they intended to work the coal. In reply the respondents, by notice in writing dated October 15, 1898, required the appellants to leave unworked a seam of coal lying under a parcel of land about $5\frac{3}{4}$ acres in extent, and stated that they were willing to make compensation for the coal required to be left unworked.

On this notice the parties went to arbitration under the Lands Clauses Consolidation Act, 1845, but owing to delays, for which neither party was to blame, proceedings under the

reference did not begin until June, 1900. The arbitration was finished on February 1, 1901, and on April 26 following the arbitrator stated his award in the form of a special case, the material paragraphs of which were as follows: 9. Coal rose in value subsequently to the date of the notice of October 15, 1898. 10. . . . . the coal company claimed that, in consequence of the rise, the compensation to be paid by the waterworks company should be assessed, not on the basis of the knowledge of the value of the mines, &c., possessed at the date of the notice of October 15, 1898, which basis is hereinafter called "the first alternative," but on the basis of the knowledge of the value which was subsequently acquired, which last-mentioned basis is called "the second alternative."

The arbitrator found that, according to the first alternative, the compensation payable was 2950*l.*; according to the second, 5650*l.*

Ridley and Phillimore JJ. held the appellants entitled to the larger sum. (1) The Court of Appeal (Vaughan Williams, Romer, and Mathew L.JJ.) reversed this decision. (2) They held that the appellants were only entitled to the lesser sum—that is, a sum assessed according to the first alternative. From this decision the mine owners appealed. The special Act of the respondents, the Pontypridd Waterworks Act, 1892 (55 & 56 Vict. c. cviii.), incorporated the Lands Clauses Acts and the Waterworks Clauses Act, 1847.

July 6. *Upjohn, K.C.*, and *W. D. Benson*, for the appellants. This is a question of compensation for damage, not of purchase. The appellants are to be indemnified for the damage, loss, and expenses which they have sustained. The Court below treated the transaction as one of purchase, but there is no purchase or contract. In *Great Northern Ry. Co.* v. *Inland Revenue Commissioners* (3), under the Railways Clauses Act, an instrument acknowledging the receipt of money paid for leaving coals unworked was held not to be liable to the ad valorem duty payable on a "conveyance or sale"; such a transaction is not

(1) [1901] 2 K. B. 798. (2) [1902] 2 K. B. 135.
(3) [1901] 1 K. B. 416.

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a sale. The same principle was expressed by Lord Cairns in *Smith* v. *Great Western Ry. Co.* (1) The amount of injury sustained is no longer matter of conjecture, but has actually been ascertained, as it is shewn by the evidence that the appellants would have reaped the full benefit, in process of working, of the increased value of the coal.

Balfour Browne, *K.C.*, and *Trevor Lewis* (*Francis-Williams*, *K.C.*, with them), for the respondents. The notice not to work is equivalent, or at least analogous, to a contract to purchase; and the value must be ascertained at the date of that notice. There must be some date fixed for ascertaining the value of the coal left unworked. The respondents have chosen their own date and must abide by it. The compensation payable is the value of the coal at the time so chosen. Otherwise the colliery owner, foreseeing a rise, might under one pretext or another postpone the arbitration in order to get an enhanced price. After the giving of a notice to treat, the owner cannot do anything to enhance the value.

Upjohn, *K.C.*, in reply.

The House took time for consideration.

Aug. 6. EARL OF HALSBURY L.C. My Lords, I think in this case that Phillimore J. stated the question for debate with perfect accuracy when he said that "the true inquiry here is not what is the value of the coalfield or of the coal, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it."

It was not a purchase of the coal, nor is it analogous to a purchase of the coal. It is what it is, and it appears to me that considering what it is I think the question propounded is solved by the statement of what it is. If it were a purchase, the rights and liabilities and profits, if there were any, would pass to the purchaser, and its value, with all its possibilities, would pass at the time notice to treat was given; but, if the question is that which I think it was, then the person who

(1) (1877) 3 App. Cas. 165.

had to make the calculation of what was the compensation ought to have arrived at the sum which experience has now shewn to be the correct amount.

It is true that he probably would not have been able to arrive at that sum accurately, but he ought to have contemplated upon such material as he had what would be the true sum. He ought to have considered the possible rise or fall of prices; but, as I have said, he probably would have made a mistake. We now know what would have been the true sum, and the proposition baldly stated appears to be that, because you could not arrive at the true sum when the notice was given, you should shut your eyes to the true sum now you do know it, because you could not have guessed it then.

It is, of course, only an accident that the true sum can now be ascertained with precision; but what does that matter? It seems to me that the whole fallacy of the contention that you may not look to the facts that have occurred rests upon the false analogy of a sale.

I am of opinion that the analogy is a false one, and I move your Lordships that the decision of the Court of Appeal be reversed and the original judgment restored, and that the respondents do pay to the appellants the costs both here and below.

Lord Macnaghten. My Lords, this is a question of compensation under the Waterworks Clauses Act, 1847.

The statement in the special case as to the rise in the value of coal seems to require explanation. There is no dispute as to the facts. It was stated by the appellants and not disputed by the respondents that, but for the notice given by the respondents, the coal in the protected area would have been reached about June, 1900, and would have been worked out in about two years from that date. The appellants gave evidence before the arbitrator to prove (1.) the tonnage of coal in the protected area that would have been brought to bank within each consecutive period of three months; (2.) the cost and expense of getting that coal; and (3.) the market prices current during each period in respect of such coal. The

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appellants also gave evidence to prove that at the time when the rise in price came they would have been in a position to make forward contracts for the delivery of the whole of the coal within the protected area, and would thus have been enabled to secure the full benefit of the rise.

It was contended by the respondents that the arbitrator ought to have rejected this evidence altogether, and to have been guided in making his award solely by facts and circumstances known at the date of the notice of October 15, 1898, and such inferences, if any, as to the probable course of future events as experts (if experts there be in such matters) could properly have drawn at the date of the notice, supposing them to be unbiased and unprejudiced in their forecast by knowledge of what actually did occur. That view was adopted by the Court of Appeal.

The question turns on three sections in the Act of 1847—s. 6, s. 22, and s. 25. These sections cover much the same ground; they are to be read together, and, if any defect or obscurity be found in any one, recourse is to be had to the whole series of enactments: see *Smith* v. *Great Western Ry. Co.* (1)

Sect. 6 requires the undertakers to make "full compensation" for the value of lands used for the purpose of their special Act, and for all damage sustained by reason of the exercise of the powers vested in them by the special or any general Act. It also provides by reference to the Lands Clauses Consolidation Acts for the adjustment of compensation and the enforcement of payment.

Sect. 22 enacts that if a mine owner desires to get the minerals lying under the property of the undertakers, or within the prescribed distance from their works, he is to give thirty days' notice before commencing to work, and then, where danger is apprehended, the undertakers may by counter-notice prevent working within a specified area on the terms of making compensation. In the absence of agreement, compensation is to be made "as in other cases of disputed compensation."

Sect. 25 provides for payment by the undertakers of all

(1) 3 App. Cas. 165.

"expenses and losses" occasioned by the exercise of these powers as well as payment for any mines or minerals not purchased by the undertakers, and which cannot be obtained by reason of making and maintaining the works, or by reason of apprehended injury from the working of such mines or minerals; and, again, in regard to the question of compensation, reference is made to the Lands Clauses Consolidation Acts.

My Lords, I cannot find in this group of sections any provision or even any suggestion to the effect that a line is to be drawn at the date of the counter-notice, and that all that occurs after that date is to be as if it had never happened.

It appears to me that the case put forward on behalf of the respondents is based on a false analogy. The counter-notice by the undertakers following a notice of the mine owners under s. 22 does not operate to make a contract or to transfer property. It is not even a step towards a contract or a step towards expropriation. The undertakers acquire no property in the minerals. The property remains where it was. The mine owner is prohibited from working, and the undertakers are bound to make full compensation. That is all. If the question goes to arbitration, the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark? The mine owner prevented from working his minerals is to be fully compensated—the Act says so. That means that so far as money can compensate him he is to be placed in the position in which he would have been if he had been free to go on working. Here it has been proved to demonstration that if he had not been interfered with he would have made between 5000*l.* and 6000*l.* I cannot understand upon what principle it is maintained that he should be content with half, and that that half is full compensation.

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I think the appeal ought to be allowed, and the judgment of the Divisional Court restored with costs here and below.

My noble and learned friend Lord Shand has asked me to add that he concurs in this opinion.

LORD ROBERTSON. My Lords, the following propositions in law seem to be perfectly clear. The coal in question was not taken and acquired (and could not be taken and acquired) by the respondents, but, on the contrary, remained the property of the appellants. After the notice of October 15, 1898, the appellants were disabled from working the coal. The resulting pecuniary obligation on the respondents was to pay compensation to the appellants for being thus prevented from working the coal.

It follows that what is due to the appellants is not the price on a transaction of sale, but compensation for a continuing embargo on working. The sum to be paid would thus be whatever sum could best be made out to be the profit that would have been made by the appellants if they had been free to work. Any estimate of this profit necessarily involves the question, "How long would the coal in question take to work out?" if for no other reason than in order to compute the cost of working. If the question thus presented has to be solved ab ante, the arbitrator, or whoever has to deal with it, must form the best conjecture he can of probable prices and probable wages during the period required to work out the area in question. But these calculations are resorted to merely in the absence of facts, and not because the time to be considered is that moment of time when the notice of October 15, 1898, was presented. And if, owing to the course of the procedure, the period required for the working out of the coal in question has come to be matter of history, then estimate and conjecture are superseded by facts as the proper media concludendi. I do not mean that the proper course in awarding compensation is to wait for the expiry of the period required for working out the coal. On the contrary, it is natural that the compensation should be assessed once for all and by estimate. But the point

is that as in this instance facts are available, they are not to be shut out.

I have only to add that my view exactly coincides with that of Phillimore J. when he says: "The true inquiry here is not what is the value of the coalfield or of the coal, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it."

The opposite view seems to me to rest on the erroneous analogy between the notice given on October 15, 1898, and a notice where land is taken. The notice of October 15 is merely, and purports to be merely, a notice of the willingness of the respondents to make compensation for what they require to be left unworked, and so it is described in s. 23 of the Act in question.

LORD LINDLEY. My Lords, I am of the same opinion, and I cannot usefully add anything.

Order of the Court of Appeal reversed and judgment of the King's Bench Division restored with costs here and below: cause remitted to the King's Bench Division.

Lords' Journals, August 6, 1903.

Solicitors: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare; Wrentmore & Son, for Frank James & Sons, Cardiff.*

[HOUSE OF LORDS.]

H. L. (E.) 1903 Aug. 7.

THE CITY OF LONDON ELECTRIC LIGHTING COMPANY, LIMITED . } APPELLANTS;

AND

THE MAYOR, &c., OF LONDON . . RESPONDENTS.

Municipal Corporation — City of London — Electric Lighting — Contract — Validity — Members of Corporation "directly or indirectly interested or concerned in" Contract — City of London Sewers Act, 1848 (11 & 12 *Vict. c. clxiii.*), *s.* 42.

Contracts for lighting the City of London, made between electric companies and the Commissioners of Sewers, are, like all contracts by companies with the Commissioners, upon the true construction of s. 42 of the City of London Sewers Act, 1848, null and void if at the date of the contracts any of the Commissioners, members of the Court of Aldermen or the Common Council, were shareholders in the lighting companies. But a valid contract is not made invalid by the mere fact that after the contract was made it was with the consent of the Commissioners transferred to another company in which Commissioners or members of the Court of Aldermen or of the Common Council were shareholders.

The decision of the Court of Appeal, [1901] 1 Ch. 602, affirmed.

By a contract of May 19, 1890, the Brush Company agreed with the Commissioners of Sewers of the City of London to light by electricity a portion of the City called the Central District; and by a contract of February 5, 1891, agreed with the Commissioners to light a portion of the City called the Western District. At the date of each of these contracts a common councillor and a commissioner of sewers were shareholders in the Brush Company.

By a contract of May 28, 1890, the Laing Syndicate agreed with the Commissioners to light by electricity a portion of the City called the Eastern District. At that time no commissioner, alderman, or common councilman was a shareholder in the syndicate, but several commissioners, aldermen, and common councilmen were shareholders in the appellant company in August, 1891, when the contract was with the consent of the Commissioners transferred to the appellant company.

In August, 1891, the two contracts with the Brush Company were also transferred to the appellant company. By the City of London Sewers Act, 1897, the Commission of Sewers was abolished, and the rights and liabilities of the Commissioners were transferred to the respondents. The respondents having repudiated all three contracts as null and void, the appellants brought an action against the respondents claiming a declaration that the contracts were valid. Farwell J. made an order declaring that the three contracts were valid and binding on the respondents. The Court of Appeal (Rigby, Vaughan Williams, and Stirling L.JJ.) reversed that decision as to the two contracts with the Brush Company, holding that they were made void by s. 42 of the City of London Sewers Act, 1848; and affirmed Farwell J.'s decision as to the contract with the Laing Syndicate. (1) Against this decision, so far as it was adverse to them, the appellants brought their present appeal, and the respondents brought a cross-appeal as to the contract with the Laing Syndicate.

Sect. 42 of the City of London Sewers Act, 1848 (c. clxiii.), runs thus: "Provided also and be it enacted that no person being a commissioner or a member of the Court of Aldermen or of the Common Council of the City shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour or for any other matter or thing whatsoever, upon pain that every such contract shall be null and void . . . ."

Sect. 53 of the City of London Sewers Act, 1851 (c. xci.), runs thus: "That no person, being a commissioner, who is a shareholder in, or surveyor, solicitor, or agent for, any gas company, water company, paving company, or any work, undertaking or speculation, the contracting with or the promotion or carrying out of which shall be discussed at any meeting of the Commissioners, shall be eligible to sit or vote as a commissioner while such subject is under the discussion of the Commissioners."

(1) [1901] 1 Ch. 602.

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May 14, 15. *Cripps, K.C.*, and *Roskill, K.C.*, for the appellants. Upon the true construction of the Act of 1848, s. 42 applies only to "construction contracts," i.e., contracts for the construction of works or the supply of materials which would have become the property of the Commissioners. The supply of electricity for lighting the City is not among the matters specifically enumerated in s. 42, nor ejusdem generis. Upon the true construction of s. 53 of the Act of 1851, shareholders in companies contracting with the Commissioners are not directly or indirectly interested within the meaning of s. 42 of the Act of 1848 in contracts made by those companies with the Commissioners. The later section is repugnant to the earlier and impliedly repeals it.

Lawson Walton, K.C., and *Danckwerts, K.C.* (*A. J. Walter* with them), for the respondents.

Cripps, K.C., in reply.

Aug. 7. EARL OF HALSBURY L.C. My Lords, in this case a declaration is sought to establish the validity of three contracts entered into between the City of London Electric Lighting Company, Limited, and the mayor and commonalty and citizens of the City of London, and the question sought to be raised by the parties is whether or not the contracts, or any one of them entered into between them, is valid or binding on the defendants.

The defendants have repudiated them, not as I understand that they have any objection to the substance of the contracts, but, being advised by counsel that the contracts were invalid, they felt bound to test that question in a Court of law. Farwell J., before whom the question came, was of opinion that they were valid. The Court of Appeal has declared two of them to be invalid, allowing the third to stand.

The whole question turns upon s. 42 of the London Sewers Act, 1848. I so far agree with Farwell J. that I think the first thing to see is whether the Act of Parliament is clear or is fairly susceptible of two constructions; but I regret to have to add that I think it is clear and is not fairly susceptible of two constructions. In a very ingenious and elaborate judgment

the learned judge decides in favour of the validity of the contracts in question upon the ground that they are not what he calls "construction" contracts; but I am unable to concur with the view that such a distinction can be made, and that the disqualification under the statute which I have quoted does not apply.

The mayor and corporation of the City are now (since 1897) in the place of those who at the date of the contract were the Commissioners of Sewers of the City. By the Act of 1897 all their duties and liabilities are now vested in the City itself. That the aldermen, commissioners, and common councilmen have a disqualifying interest in the contracting companies cannot be denied unless the distinction insisted on by the learned judge can be made out.

In respect of two of the three contracts, it is admitted that a common councilman, a commissioner of sewers, and a lord mayor for the time being—in that character both an alderman and an ex-officio commissioner—were shareholders, and in respect of those two contracts, heartily as I regret the conclusion at which I am forced to come, I cannot doubt that these contracts by reason thereof are invalid.

I have striven to escape the stringency of the language, since I think that no one will doubt that the contracts were fairly and properly made with a due regard to the public interest; but I cannot escape from the language of the statute. It is to my mind too clear to enable me to adopt the subtle reasoning of the learned judge below. The distinction which the learned judge has discovered may justly be made in this respect, that some of the contracts undoubtedly are construction contracts and some of them are not; but the defect of the reasoning, I think, consists in this—that the distinction which the learned judge has discovered is one not made by the statute. The words are "directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour or for any other matter or thing whatsoever." I am unable to interpose any qualification.

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Looking at the language of the statute, and having regard to the object and the policy which apparently dictated it, I cannot doubt that it meant what I think it has said in plain terms.

It seems to me that the contract, an interest in which is prohibited, is a contract made or entered into by or on behalf of the Commissioners for any matter or thing whatsoever—that is, in addition to contracts for the execution of works or for furnishing materials.

My Lords, I am unable to get over the stringency of these words, and I must hold them to be applicable to the two contracts in respect of which Farwell J. held them to be valid.

With respect to the third contract, I agree with Stirling L.J. that a different question arises where, at the time of the making of the contract, no commissioner, alderman, or common councilman was a shareholder, and I agree with him that, under the circumstances stated in detail by that learned judge, the contract has not become invalid because at a subsequent date several commissioners, aldermen, and common councilmen became shareholders.

The result is that I think the judgment of the Court of Appeal is right, and that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD DAVEY. My Lords, the judgment of Farwell J. in this case is based on the division which he thought was to be found in the Act of 1848 of the contracts authorized by that Act into two classes or categories. One class of contracts he called construction contracts, and he considered that the provisions of s. 42 related only to contracts of that character. The phrase "construction contracts" as used by the learned judge has a very elastic meaning, for it includes contracts for supply of materials or labour. The distinction as stated by him was between contracts for the execution of works or supply of materials to the City which will become their own property and contracts for the supply of such things as water, gas, or other illuminants by persons owning the works from

which the supply is derived, and these contracts he calls contracts of supply.

My Lords, I must confess that in my opinion this division of contracts is not warranted by anything in the Act of 1848, and is fanciful and arbitrary, and in fact there is no real difference for legal purposes between the two classes of contracts. Gas, electricity, and water are all of them, it is true, res quæ ipso usu consumuntur, but so are materials for road-making or paving, although the rate of consumption is somewhat slower. [His Lordship then discussed ss. 33–42, and came to the conclusion that s. 42 applied to all contracts without distinction.]

Farwell J. also thought that s. 116 alone gave the power to make contracts for lighting the streets. I do not so read the Act. I think the power to contract is conferred on the Commissioners by s. 33, and the meaning of s. 116 is that instead of doing the work of lighting the streets themselves they may contract with gas companies and other persons to do it for them.

Another argument put forward by the appellants is based on s. 53 of the Act of 1851. I have had some difficulty in appreciating the argument. A section in a later Act cannot be used for the purpose of construing an earlier enactment, though it may repeal or vary it. There is certainly no express repeal, and there is no repugnancy between the two sections from which the repeal of the earlier one might be implied.

Sect. 42 of the Act of 1848 imposes a penalty on parties interested in any contract made by the Commissioners, and avoids a contract in which any of the specified parties are interested. Sect. 53 of the Act of 1851 deals with a different subject-matter, or rather with the same subject in a different way. It makes any of the specified persons ineligible to sit or vote as a commissioner while the contracting with any company in which he is interested or the promotion or carrying out of any work, undertaking, or speculation is under the discussion of the Commissioners. A person may be a commissioner when the negotiation for the contract is being conducted and resign his seat (as he would probably do) before the contract is

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actually made, or he may have become a commissioner after the contract is made, and in that case he is prohibited from sitting or voting while the carrying out of it is under discussion. In neither of these cases would the earlier enactment apply, but the later one would apply to both.

I fully appreciate the stringency and drastic character of the enactment in s. 42 of the Act of 1848. It applies to any common councillor whether he is a commissioner or not, and the remotest interest in the contract will not only expose the interested person to a penalty of 100*l*., but will also avoid the contract. But the stringency of the section is not a reason for a Court of law to decline to give effect to it or construe it otherwise than according to the plain meaning of the words. I cannot, therefore, but agree with the judgment of my learned and lamented friend, Rigby L.J., in holding the contracts relating to the Western and Central Districts to be void.

The complicated history of the contract for the Eastern District has been very carefully analyzed and stated by Stirling L.J. It appears that no person within the prohibition was interested in the Laing Syndicate, with whom the contract was made, but certain persons were shareholders in the company to which the contract was afterwards transferred. I am certainly not disposed to extend the operation of s. 42 beyond what the words require, and I do not think that a contract which was valid in its inception is avoided by a person within the prohibition subsequently acquiring an interest in it. The learned Lord Justice also finds that there was no novation, so as to place the appellant company in the position of contractors directly with the corporation. It is true that the appellant company has become the undertaker within the meaning of the provisional order, and is now the only company able to exercise the powers thereby conferred. That, however, will not in itself place them in a contractual relation with the corporation. I agree with the Lord Justice that in giving their consent to the transfer of the undertaking to the appellants the Commissioners carefully preserved their rights under the original contract, and have not discharged the original contractors from liability for its performance. I think, therefore, with him that there has been no

new contract made between the appellant company and the corporation as regards the Eastern District.

I am, therefore, of opinion that both appeals should be dismissed with costs.

LORD ROBERTSON. My Lords, on the cross-appeal I am unable to discover a contract entered into between the Commissioners and the City of London Electric Company. That the City of London Electric Company are, with the consent of the Commissioners (and their successors, the corporation), doing the work of the original contractors does not prove that the Commissioners have contracted with them. The Commissioners could only contract in the manner prescribed by the statutes creating their powers, and there is no such contract. This being so, the City of London Company, not standing in a contractual relation to the Commissioners, there is no room for any argument about a supervening nullity in a contract originally valid, and we have no occasion to deal with that argument.

Turning, then, to the two contracts with a company in which one at least of the Commissioners was a shareholder at the times of their execution, the question is whether they are not hit by the 42nd section.

It cannot be disputed that the general words which express the third category in s. 42 are so wide as to comprehend all contracts, unless there be something outside those words to restrain their latitude. That restraint is found by the appellants in the theory—for it is no more—that s. 42 is coterminous with s. 33, and that s. 33 is limited to a certain class of contracts. [His Lordship discussed ss. 33 and 42, and came to the conclusion that s. 42 applied to all contracts without distinction.]

Sect. 53 of the Act of 1851 seemed at first to carry the appellants some way; but a closer examination greatly reduces its importance. That section mixes up a number of persons, things, and times, and applies general words to them all. It is only by picking out the shareholder and applying him to one of the things at one of the stages that the appellants'

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argument arises; and when it does arise it does not present a repugnancy with the wide interpretation of s. 42 of the Act of 1848, but rather a superfluity. The explanation of the Court of Appeal seems to me to be adequate to satisfy the language, even when minutely examined. The section does not, in my judgment, raise any implication sufficient to overcome the considerations to which I have already adverted.

It is quite true, as the appellants have pointed out, that the complicated questions arising out of shareholding in limited companies are very crudely dealt with by the provisions of statutes passed before that system had been established. But the Acts of 1848 and 1851 both deal with the case of commissioners being shareholders in companies, and it is impossible to deny that a shareholder in a limited company comes under s. 42. This is enough for the decision of the present case.

Order of the Court of Appeal affirmed; appeal and cross-appeal dismissed with costs.

Lords' Journals, August 7, 1903.

Solicitors: *Ashurst, Morris, Crisp & Co.; Sir Homewood Crawford.*

[HOUSE OF LORDS.]

FENTON (PAUPER) . . . . . APPELLANT.

AND

J. THORLEY & CO., LIMITED . . . RESPONDENTS.

H. L. (E.) 1903 Aug. 7.

Employer and Workman—Compensation—Injury "by Accident"—Workmen's Compensation Act, 1897, *c.* 37, *s.* 1, *sub-s.* 1.

In the Workmen's Compensation Act, 1897, the word "accident" is used in the popular and ordinary sense, and means a mishap or untoward event not expected or designed.

A workman, employed to turn the wheel of a machine, by an act of over-exertion ruptured himself:—

Held, that he suffered an "injury by accident" within the meaning of the Act and was entitled to compensation.

Hensey v. *White*, [1900] 1 Q. B. 481, overruled.

THE appellant, a workman employed by the respondents in their machinery, ruptured himself by an act of over-exertion in trying to turn a wheel. In an arbitration in the county court at Wandsworth in April, 1902, the learned judge held, on the authority of *Hensey* v. *White* (1), that there was no accident within the meaning of the Act. This decision was affirmed by the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.), who approved of it.

June 30. *Cyril Dodd, K.C.*, and *Frank Mellor* (*E. A. Jelf* with them), for the appellant. "Accident" in the Workmen's Compensation Act, 1897, means any unexpected or unintended result which causes a personal injury. The narrow construction put upon the Act in *Hensey* v. *White* (1) was not followed in *Boardman* v. *Scott & Whitworth* (2) and was followed in *Roper* v. *Greenwood*. (3) There seems to be a prevailing idea that "accident" means something fortuitous, external to the workman: *Timmins* v. *Leeds Forge Co., Ld.* (4) In Scotland the true meaning of the Act was explained in *Stewart* v. *Wilsons and Clyde Coal Co., Ld.* (5)

(1) [1900] 1 Q. B. 481.
(2) [1902] 1 K. B. 43.
(3) (1900) 83 L. T. (N.S.) 471.
(4) (1900) 83 L. T. (N.S.) 120.
(5) (1902) 5 F. 120.

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Arthur Powell, K.C., and *W. Shakespeare*, for the respondents. In the expression "injury by accident" the words "by accident" must have some meaning: they mean that the workman must have done something which he did not intend. And something must operate upon him ab extra. A man who with a diseased heart runs upstairs and falls is not injured by accident; nor one who catches a zymotic disease from a fellow-workman, or is injured in rescuing some one from a dangerous place knowing it was dangerous. The argument for the respondents is well put in Lord Adam's judgment in *Clidero* v. *Scottish Accident Insurance Co., Ld.* (1) If an act is the natural result of the preceding acts it is not accidental. The causa proxima is alone to be considered.

This is illustrated by decisions in America: *Feder* v. *Iowa State Traveling Men's Association* (2) and *Southard* v. *Railway Passengers Assurance Co.* (3) In one case the Supreme Court left the question as one of fact to the jury: *United States Mutual Accident Association* v. *Barry*. (4) The accident must be in the means by which the result is brought about and not in the result itself: *Pugh* v. *London, Brighton and South Coast Ry. Co.* (5); *Hamlyn* v. *Crown Accidental Insurance Co.* (6)

Dodd, K.C., in reply.

The House took time for consideration.

Aug. 7. LORD MACNAGHTEN. My Lords, Fenton, the appellant, was a workman in the employment of the respondents, who manufacture for sale an article called Thorley's Food for Cattle. He was employed to look after one of the machines used in preparing the food. It seems to have been a sort of combination of kettle and press. The actual operation performed by this machine takes about six or eight minutes. At the end of that time the workman in charge moves a lever and then turns a wheel for the purpose of raising the lid and

(1) (1892) 19 R. 355.
(2) (1899) 70 Amer. St. 212; 107 Iowa, 538.
(3) (1868) 34 Conn. 574, 578.
(4) (1888) 131 U. S. 100, 121.
(5) [1896] 2 Q. B. 248.
(6) [1893] 1 Q. B. 750.

removing the contents, which come out, or ought to come out, dried and pressed into separate layers of cakes.

On December 3, 1901, Fenton was at work at his machine. He had got through the operation on that day a good many times without hitch or difficulty; but about 9 P.M., or a little later, when the time came for opening the vessel, the wheel would not turn. He then called a fellow-workman to his assistance, and the two men together set to work to move the wheel. Suddenly Fenton felt something which he describes as "a tear in his inside," and it was found that he was ruptured.

Fenton was a man of ordinary health and strength. There was no evidence of any slip, or wrench, or sudden jerk. It may be taken that the injury occurred while the man was engaged in his ordinary work, and in doing or trying to do the very thing which he meant to accomplish.

There is evidence that the wheel was short of one spoke or handle, which may have made it more difficult to grasp than usual, and it was discovered afterwards that there was a leak in the kettle which let moisture into the vessel below, glueing its contents together, and so causing the lid to stick. I mention these circumstances merely for the purpose of putting them aside. It was, indeed, argued by the learned counsel for the appellant that, if the mishap that befell Fenton was not of itself and apart from all other circumstances an accident within the meaning of that word as used in the Act, then these two things—the loss of a spoke in the wheel and the leak in the kettle—introduced an element of accident—a fortuitous element it was called—which would satisfy the terms of the enactment however narrowly it may be construed. In my opinion, they do not affect the question in the least.

The Court of Appeal held that the injury which Fenton sustained was not "injury by accident" within the meaning of the Act. In so holding they followed an earlier decision of the Court in the case of *Hensey* v. *White* (1), which in its circumstances is not distinguishable from the present case. In *Hensey* v. *White* (1) a passage was cited from the opinion of

(1) [1900] 1 Q. B. 481.

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Halsbury L.C. in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1), in which his Lordship said: "I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'" Founding themselves upon that expression, the learned judges of the Court of Appeal held in *Hensey* v. *White* (2), as they have held here, that there was no accident, because (to quote the leading judgment) there was "an entire lack of the fortuitous element." What the man "was doing," it was said, "he was doing deliberately, and in the ordinary course of his work, and that which happened was in no sense a fortuitous event." To the expression as used by Lord Halsbury in the passage in which it occurs, no possible objection can be taken; but it is, I think, to be regretted that the word "fortuitous" should have been applied to the term "injury by accident" in the Workmen's Compensation Act. If it means exactly the same thing as "accidental," the use of the word is superfluous. If it introduces the element of haphazard (if I may use the expression), an element which is not necessarily involved in the word "accidental," its use, I venture to think, is misleading, and not warranted by anything in the Act.

And now I must ask your Lordships' attention to the Act itself; but before doing so, there are two observations I should like to make.

If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him.

One other remark I should like to make. It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the Act some injuries ordinarily described as "accidents" which beyond all others merit favourable consideration in the interest of work-

(1) (1887) 12 App. Cas. 518. (2) [1900] 1 Q. B. 481.

men and employers alike. A man injures himself by doing some stupid thing, and it is called an accident, and he gets the benefit of the insurance. It may even be his own fault, and yet compensation is not to be disallowed unless the injury is attributable to "serious and wilful misconduct" on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that that is right. I do think that if such were held to be the true construction of the Act, the result would not be for the good of the men, nor for the good of the employers either, in the long run. Certainly it would not conduce to honesty or thoroughness in work. It would lead men to shirk and hang back, and try to shift a burthen which might possibly prove too heavy for them on to the shoulders of their comrades.

Now I turn to the Act. The title of the Act is, "An Act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment." It has been held that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful judge, "the title of an Act of Parliament is no part of the law, but it may tend to shew the object of the legislature." Those were the words of Wightman J. in *Johnson* v. *Upham* (1), and Chitty J. observed in *East and West India Docks* v. *Shaw, Savill and Albion Co.* (2) that the title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act. Surely, if such a reference is ever permitted, it must be permissible in a case like this, where Parliament is making a new departure in the interest of labour, and legislating for working men, presumably in language that they can understand.

The 1st section of the Act, sub-s. 1, declares that "if in any employment to which this Act applies personal injury by

(1) (1859) 2 E. & E. 263. (2) (1888) 39 Ch. D. 531.

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accident arising out of and in the course of the employment is caused to a workman," his employers shall be liable to pay compensation. Now the expression "injury by accident" seems to me to be a compound expression. The words "by accident" are, I think, introduced parenthetically as it were to qualify the word "injury," confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design. Then comes the question, Do the words "arising out of and in the course of the employment" qualify the word "accident," or the word "injury," or the compound expression "injury by accident"? I rather think the latter view is the correct one. If it were a question whether the qualifying words apply to "injury" or to "accident," there would, I think, be some difficulty in arriving at a conclusion. I find in s. 4 the expression "accident arising out of and in the course of their employment." In s. 9 I find the words "personal injury arising out of and in the course of his employment," while in s. 1, sub-s. 2 (*b*), the qualifying words seem to be applied to the compound expression "injury to a workman by accident." The truth is that in the Act, which does not seem to have had the benefit of careful revision, "accident" and "injury"—that is, injury by accident—appear to be used as convertible terms; for instance, in s. 2 "notice of the accident" has to be given, and that notice is referred to immediately afterwards as "notice in respect of an injury under the Act." I come, therefore, to the conclusion that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed.

It would serve no useful purpose to review the English cases on the subject. The decisions before *Hensey* v. *White* (1) are curiously conflicting. It would seem almost as if the Court, in some cases at least, simply confirmed the finding of the county court judge as a finding of fact, however opposed the finding might be to a previous decision of the Court on facts precisely similar. With the decision in *Hensey* v. *White* (1),

(1) [1900] 1 Q. B. 481.

and the decisions in which that case has been followed, including *Roper* v. *Greenwood* (1), speaking with all deference, I am unable to agree.

There is, however, a recent decision of the Court of Session in Scotland to which I should like to call your Lordships' attention, and in which I agree entirely. It is the case of *Stewart* v. *Wilsons and Clyde Coal Co., Ld.* (2) A miner strained his back in replacing a derailed coal hutch. The question arose, Was that an accident? All the learned judges held that it was. True, two of the learned judges expressed an opinion that it was "fortuitous," but they could not have used that expression in the sense in which it was used in *Hensey* v. *White*. (3) What the miner did in replacing the hutch he certainly did deliberately and in the ordinary course of his work. There was nothing haphazard about it. Lord M'Laren observed that it was impossible to limit the scope of the statute. He considered that "if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in" . . . . "this is accidental injury in the sense of the statute." Lord Kinnear observed that the injury was "not intentional" and that "it was unforeseen." "It arose," he said, "from some causes which are not definitely ascertained, except that the appellant was lifting hutches which were too heavy for him. If," he added, "such an occurrence as this cannot be described in ordinary language as an accident, I do not know how otherwise to describe it."

The learned counsel for the respondents, in his able address, referred to several cases on policies of insurance intended to cover injuries described either as arising from accidental, violent, and external causes, or in somewhat similar terms. I do not think that these cases throw much light upon the present question. They turn on the meaning and effect of stipulations for the most part carefully framed in the interest of the insurers. But on the whole they do not, I think, make against the construction which I ask your Lordships to put on

(1) 83 L. T. (N.S.) 471. (2) 5 F. 120.
(3) [1900] 1 Q. B. 481.

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the word "accident" in the Workmen's Compensation Act. I will not trouble your Lordships by going through the cases which Mr. Powell cited. I will only refer to one, *United States Mutual Accident Association* v. *Barry* (1), a case of considerable authority, for it was a case in the Supreme Court of the United States. A jury had found in favour of the assured, who had injured himself fatally in jumping off a platform some four or five feet high. There was a motion for a new trial on the ground of misdirection. The Court refused to disturb the verdict. In the course of the judgment two cases were referred to with approval as supporting the conclusion at which the Court arrived. One was an English, the other an American case. I give them both as stated in the judgment. "In *Martin* v. *Travellers' Insurance Co.*" (2) said the learned judge who delivered the opinion of the Court, "the policy was against any bodily injury resulting from any accident or violence, 'provided the injury should be occasioned by any external or material cause operating on the person of the insured.' In the course of his business he lifted a heavy burden and injured his spine. It was objected that he did not sustain bodily injury by reason of an accident. The plaintiff recovered. In *North American Insurance Co.* v. *Burroughs* (3) the policy was against death in consequence of accident, and was to be operative only in case the death was caused solely by an accidental injury. It was held that an accidental strain resulting in death was an accidental injury within the meaning of the policy, and that it included death from any unexpected event happening by chance and not occurring according to the usual course of things."

My Lords, I have no doubt that in the present case the county court judge ought to have found in favour of the appellant, if he had not been compelled to decide the other way by recent decisions in the Court of Appeal.

I move your Lordships that the decision of the Court of Appeal and of the county court judge be reversed with costs in both Courts, and that the action be remitted to the county

(1) 131 U. S. 100, 121. (2) (1859) 1 F. & F. 505.
(3) (1871) 69 Penn. St. 43.

court with a direction to the judge to ascertain the amount of compensation to which the appellant is entitled. The costs here will follow the rule laid down for pauper appeals.

LORD SHAND (read by Lord Macnaghten). My Lords, I agree in thinking that the appeal should be sustained, and the judgment of the Court of Appeal and of the county court judge reversed; and I concur in the judgment of my noble and learned friend Lord Macnaghten, which I have had an opportunity of carefully considering.

If the word "accident" were interpreted in the Workmen's Compensation Act, 1897, or were there defined so as to bear a special limited or narrow sense only, it might be necessary to consider and examine the American authorities, which were so fully cited by Mr. Powell in his able argument. But I agree with my noble and learned friend in thinking that the words "personal injury by accident" and "accident" are used in the statute in the popular and ordinary sense of these words. I refrain from referring in detail to the language used in the different parts of the statute, because in so doing I should only be repeating what has already been said.

I shall only add that, concurring as I fully do in holding that the word "accident" in the statute is to be taken in its popular and ordinary sense, I think it denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence.

LORD DAVEY. My Lords, I have had an opportunity of reading and considering the judgment which has just been delivered by my noble and learned friend Lord Macnaghten. I agree with it, and have nothing to add to that judgment.

LORD ROBERTSON. My Lords, it is not disputed that this man, being a person of ordinary strength, suffered personal injury while working at his employer's business, and because he applied such force to his work as to rupture him. Nor is it suggested that he hurt himself intentionally. The plain fact

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is that he miscalculated or by inadvertence did not compare the relative resisting forces of the wheel and his body. In this state of facts I am of opinion that this personal injury arose by accident out of and in the course of the man's employment in the sense of the 1st section of the Workmen's Compensation Act, 1897, and I think there was "an accident" in the sense of the other sections in which the word "accident" is used, whether preceded by "an," "any," or "the."

Much poring over the word "accident" by learned counsel has evolved some subtle reasoning about these sections. I confess that the arguments seem to me to be entirely over the heads of Parliament, of employers, and of workmen. No one out of a Law Court would ever hesitate to say that this man met with an accident, and, when all is said, I think this use of the word is perfectly right. The word "accident" is not made inappropriate by the fact that the man hurt himself. This use is indeed directly sanctioned by the Act itself, for s. 1, sub-s. 2 (*c*), plainly implies that an accident giving right to compensation may be attributable to the fault of the injured man himself. In the present instance the man by an act of over-exertion broke the wall of his abdomen. Suppose he had by the same act broken his leg, the question would be the same. But suppose the wheel had yielded and been broken by exactly the same act, surely the breakage would be rightly described as accidental. Yet the argument against the application of the Act is in this case again exactly the same—that there is nothing accidental in the matter, as the man did what he intended to do. The fallacy of the argument lies in leaving out of account the miscalculation of forces, or inadvertence to them, which is the element of mischance, mishap, or misadventure.

In this view, I do not rely on the historical circumstance that the sticking of the wheel was caused by an accidental leak. I think myself that the leak is too remote to impart its own accidental character to the injury which ultimately resulted to this man.

I am clear for allowing the appeal.

LORD LINDLEY. My Lords, the Workmen's Compensation Act, 1897, contains no definition of the word "accident"; but the interpretation and legal effect of the Act, when applied to ascertained facts, are clearly questions of law as distinguished from questions of fact. I will assume for the present that it is for the plaintiff to prove personal injury caused by an accident. But when personal injury and its cause or causes have been ascertained the question whether such cause or causes amount to an accident within the meaning of the Act is a question of law on which the decision of the county court judge is not final; and is not a question of fact on which his decision is not open to appeal. Upon this point I will only remind your Lordships of the observations of Lord Brampton in *Hoddinott* v. *Newton, Chambers & Co., Ld.* (1), which were concurred in by the other noble Lords who heard that case, although they differed in the result.

The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word "accident" is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but for legal purposes it is often important to distinguish careless from other unintended and unexpected events.

In this Act of Parliament the word is used in a very loose way. The title speaks of "accidental injuries"; s. 1, sub-s. 1, uses the expression "personal injury by accident." Personal negligence and even a wilful act on the part of an employer or any one for whom he is responsible is not called an accident, but it can be dealt with as if it were an accident: s. 1, sub-s. 2 (*b*). Serious and wilful misconduct on the part of a workman precludes him from obtaining the benefit of the Act: s. 1,

(1) [1901] A. C. 49, at p. 68.

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sub-s. 2 (*c*); but mere carelessness on his part does not. Further, s. 1, sub-s. 4, shews that the Act applies to cases where a workman sustains injuries for which, but for the Act, he would have no remedy. In s. 2 "accident" and "accident causing the injury" are used indiscriminately in fixing the time within which notice of it has to be given.

It is impossible to read the Act without coming to the conclusion that the object of the Legislature was to throw upon certain classes of employers of labour the obligation to compensate their workmen for personal injuries for which such employers were not responsible before, and it becomes necessary to determine what injuries are within the Act and what are not.

The governing section is s. 1, sub-s. 1, which runs thus: "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman his employer shall be liable to pay compensation."

What is meant by "personal injury by accident"? Mr. Powell, in his very able argument, contended that there must be, first, a personal injury; second, that there must be an accident causing it; third, that such accident must be the proximate cause of the injury, and that nothing more remote than the proximate cause can be properly taken into account. My Lords, I cannot accede to this contention. Assuming that there must be something unintended and unexpected besides the personal injury sustained, or, in other words, assuming that there must be a personal injury and an accident causing it, I cannot agree with Mr. Powell that this statute ought to be construed as if it were a policy of insurance against accidents.

In an action on a policy the causa proxima is alone considered in ascertaining the cause of loss; but in cases of other contracts and in questions of tort the causa causans is by no means disregarded. This was pointed out by Willes J. in *Grill* v. *General Iron Screw Colliery Co.* (1), and is strikingly illustrated by *Siordet* v. *Hall* (2) and numerous other cases of a similar kind. *Siordet* v. *Hall* (2) was an action against a steamship owner for injury to cargo caused by water escaping

(1) (1866) L. R. 1 C. P. 611. (2) (1828) 4 Bing. 607; 29 R. R. 651.

from a pipe which had been burst by a sharp frost. The defence was that the accident was an act of God for which the defendant was not responsible. The judge, however, told the jury that if the water had been unnecessarily placed in the boiler, or, considering the season of the year, improperly left there without heat to prevent the action of the frost upon the pipe, the mischief was not occasioned by the act of God, but by gross negligence. The jury found for the plaintiff. A new trial was applied for on the ground of misdirection. The Court held that the loss was attributable to negligence and was not caused by the act of God so as to exonerate the defendant from liability. In other words, attention was paid to the circumstances under which the proximate cause produced the damage complained of.

The rule that in contracts of insurance the proximate cause of loss can alone be regarded is carried so far that if it were rigidly applied to this Act of Parliament its evident object would in many cases be clearly defeated. No doubt the rupture in this case was the result of an effort voluntarily and strenuously made, and it may be that a policy of insurance against accidents might be so worded as not to cover an injury so caused. But if we look further and inquire what called forth this unusual effort, we find it was an unexpected difficulty in moving the wheel of the machine, and that this difficulty arose from an unobserved leakage which caused the material in the machine to choke the mechanism. The machine was accidentally put out of order. It had worked properly until it was stopped by an accident. It is not straining language but using it in its ordinary sense to describe the personal injury as caused by an accident. The personal injury was the rupture; the cause of it was the unintended and unexpected resistance of the wheel to the force applied to it. Such a case appears to me to fall within the Act.

Every injury must have a cause. The proximate cause may be an internal strain; but if, as in this case, the strain is occasioned by an effort to overcome an obstacle accidentally presented to a workman in the course of his employment, I am not prepared to say that the Act does not apply. I think it

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clearly does, and that the interpretation put upon the Act in Scotland in *Stewart* v. *Wilsons and Clyde Coal Co., Ld.* (1), is to be preferred to the narrower construction occasionally adopted in this country.

In this case the cause of the injury is known, and it is proved that the cause was an accident. It is not, therefore, necessary to consider whether the Act applies to cases in which the cause of the injury is not known or in which the only unforeseen occurrence is the personal injury itself. But if personal injury is caused to a workman, and it arises out of and in the course of an employment to which the Act applies, it appears to me that primâ facie the Act entitles him to compensation, but that this inference may be displaced by proof that the injury is attributable to his own serious and wilful misconduct, or to some other cause which shews that the injury was not accidental.

The Scottish case above referred to is a valuable authority on this point.

The appeal in this case ought to be allowed, and the case remitted to the county court judge to assess compensation, as proposed by my noble and learned friend on the Woolsack (Lord Macnaghten).

Order of the Court of Appeal and award of the county court judge reversed, with costs here and below; cause remitted to the county court with a direction to the judge to ascertain the amount of compensation to which the appellant is entitled; the appellant's costs in this House to be taxed in the manner usual in pauper appeals.

Lords' Journals, August 7, 1903.

Solicitors: *C. F. Appleton; William Hurd & Son.*

(1) 5 F. 120.

[HOUSE OF LORDS.]

DAWSON AND OTHERS . . . . . APPELLANTS; H. L. (Sc.) 1903 July 20.

AND

SMART AND OTHERS . . . . . RESPONDENTS.

Divorce—Marriage Contract—Effect of Divorce on Children's Provisions—Income undisposed of—Scottish Act, 1573, *c.* 55.

By ante-nuptial contract of marriage the intended wife conveyed a sum of about 19,000*l.* to trustees, directing them to pay the annual income to her during her life, and after her death, in the event of her being survived by her husband, to pay the same to him during all the days of his life and survivance, and on the death of the said spouses to pay or deliver the fee or capital of the said means and estate to the child or children of the marriage.

The marriage was dissolved by decree of divorce obtained by the wife against the husband on the ground of desertion. Thereafter the wife died survived by her husband and a daughter. The daughter and her marriage contract trustees claimed that in consequence of the wife's death and the husband being divorced she (the daughter) and her trustees became entitled to the funds in the hands of her mother's marriage trustees:—

Held, affirming the decision of the Second Division of the Court of Session: (1.) That the divorce of the father was not equivalent to his death in a question as to the vesting of the daughter's provision; (2.) that during her father's life nothing fell to the daughter; and (3.) that the income which but for the divorce would have been paid to the father fell into the executory estate of the wife.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland, on a special case.

The questions in the appeal referred to certain funds in the hands of Mr. and Mrs. Gavin's marriage contract trustees, who with Mrs. Gavin's testamentary trustees were the respondents. Mrs. Johnston, Mrs. Gavin's only child, and her marriage contract trustees were the appellants.

The funds in question consisted of, first, the estate conveyed by Mrs. Gavin to the respondents, the marriage contract trustees, and, secondly, one-half of 5000*l.* conveyed to the respondents by Mrs. Gavin's father, Dr. Walker, amounting together to about 19,000*l.* Mr. Gavin, who is alive, was

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divorced from his wife on the ground of his desertion in 1885; Mrs. Gavin died in 1899, survived by the only child of the marriage, Mrs. Johnston.

The marriage contract of Mr. and Mrs. Gavin provided as regards her estate that the trustees, upon her death survived by her husband, should pay the income to him, and "on the death of the spouses pay or deliver over the fee or capital of the said means and estate to the child or children," subject to a power in the spouses of appointment and of substituting an annuity; but failing children, then to the survivor of the said Mr. and Mrs. Gavin and his or her heirs, executors, and representatives whomsoever. And as regards the 5000*l.* settled by Mrs. Gavin's father, a similar interest in the income was in the like event to be given to Mr. Gavin, and on the death of the survivor of the spouses the trustees were to pay over one-half of the capital of the said sum to the child or children of the marriage subject as before to a power in the spouses of appointment and of substituting an annuity, and failing children to whomsoever Mrs. Gavin might appoint, and failing appointment to her legal representatives whomsoever. And the other half of the 5000*l.* was to be paid over on the death of the survivor to whomsoever Mrs. Gavin might appoint. It was also declared that as regards the estate conveyed by Mrs. Gavin and one-half of the sum of 5000*l.* that it should be lawful of the spouses jointly, and failing a joint appointment, of the said Mrs. Gavin, at any time to divide and proportion as she might think proper amongst the children. The contract further declared that, if any child or children should die before the provisions under the contract and the exercise of the power of appointment should have been paid or become payable, the issue of such predeceasing child or children should stand in the place of such deceasing child or children.

By an addition made to the said contract the parties agreed that in the event of there being only one child of the marriage the spouses jointly, or in their order as mentioned in the deed, should have power to direct that the several provisions to such child should be laid out in the purchase of an annuity for such child.

Mrs. Gavin died in 1899, leaving a trust disposition by which she (inter alia) directed that the estate conveyed by her and the one-half of the 5000*l.* to which her daughter might have right should be laid out in the purchase of an annuity, and directed her trustees to provide that the same should be for Mrs. Johnston's alimentary use only and not assignable. The other half of the 5000*l.* Mrs. Gavin gave to her trustees to pay the income to her mother during her life, and after her death to certain charitable institutions. The appellants contended that on the death of Mrs. Gavin they were entitled to the funds in question; the respondents, on the other hand, maintained that no interest in the funds in question vested in Mrs. Johnston unless she survived her father.

The questions in the special case were:—

(1.) Is Mrs. Johnston's right to payment of the funds in question or any part of them contingent on her survivance of her father?

(2.) Do the annual proceeds of the funds in question during Mr. Gavin's lifetime fall to Mrs. Johnston, or do they fall into the executive estate of Mrs. Gavin?

(3.) Was Mrs. Gavin, according to the terms of the marriage contract, entitled to direct that the provisions in favour of her daughter should be laid out and employed in the purchase of an annuity for her alimentary use only and not assignable?

(4.) Are the parties of the second part (the appellants) entitled to have the capital of the said marriage contract funds paid over to them forthwith by the parties of the first part (the respondents).

By interlocutor dated December 6, 1901 (1), the Second Division of the Court of Session (Lord Young dissenting) answered the first question and the second alternative of the second question in the affirmative. (1)

1902. Nov. 11. *A. Graham Murray, L.A.*, and *W. Hunter* (of the Scottish Bar), for the appellants. The judgment of the Second Division ought to be reversed and the questions put to the Court answered, the first, the second part of the second,

(1) (1901) 4 F. 278.

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and the third in the negative, and the first part of the second and the fourth in the affirmative. It may be here mentioned that the Scottish Courts have no power to order a settlement in a case of divorce. The Act of 1573, c. 55, provides that the guilty party shall forfeit and lose tocher and nuptial donations; and, therefore, it is conceded by all parties that Mr. Gavin can take no interest in the funds in question. It has been long settled in Scotland that in a question with the wife the divorced husband is treated as if he were dead. This principle was recognised in *Harvey* v. *Farquhar*. (1) The question as to the effect of the guilty spouse's forfeiture upon the interests of the children came up first in *Harveys' Judicial Factor* v. *Spittal's Curator ad Litem* (2), and the Court below in this case held themselves bound by that decision; but it is of little weight against the appellants. In this case there is a vested interest in the child of the marriage free from contingency. Life-rent in Scotland is a burden on the fee, and when the burden is removed the fee is free; the receipt of the fee by the child is here accelerated by something done by the husband, Mr. Gavin. There is nothing in the marriage contract to prevent Mr. and Mrs. Gavin from renouncing their rights, and the appellants maintain that the forfeiture of Mr. Gavin's rights has a similar effect to the discharge or renunciation by Mr. Gavin of his rights: see *Muirhead* v. *Muirhead* (3) and *Pretty* v. *Newbigging*. (4) On the second question, there was no power to cut down the words of the contract by substituting an annuity for the fee—that is, Mrs. Gavin had no power to make the annuity alimentary and not assignable; secondly, she could not do it without the intervention of trustees: *Murray* v. *Macfarlane's Trustees* (5); *Kennedy's Trustees* v. *Warren*. (6) *Taylor's Trustees* v. *Barnett* (7) was a will case and does not apply.

Scott Dickson, S.-G. for Scotland, and *G. L. Macfarlane* (of the Scottish Bar), for the respondents. Mrs. Johnson acquired

(1) (1872) L. R. 2 H. L., Sc. 192; 10 M. (H.L.) 26.
(2) (1893) 20 R. 1016.
(3) (1890) 15 App. Cas. 289.
(4) (1854) 16 D. 667.
(5) (1895) 22 R. 927.
(6) (1901) 3 F. 1087.
(7) (1893) 20 R. 1032.

no vested right to the funds during the survivance of her father. Her rights depended on the marriage contract. The provision of life-rent to the spouses and then the fee to the children and grandchildren of the marriage cannot be altered except in so far as the Act of 1573 alters the husband's position. Grandchildren are beneficiaries under the deed, and Mrs. Johnson may not survive her father. The contract says the children shall not get the fund till the death of the spouses, and it is only then when the children's rights become operative. It is not correct to say that the guilt of one of the spouses is his or her death for all purposes; the rights of the innocent spouse are in no way affected, nor are the rights of the children affected by the divorce. By the act the guilty husband loses his whole interest, and it goes to his wife, and the proceeds of the fund during his life fall into the executive estate of Mrs. Gavin; then, on the husband's natural death, the children or their issue take whatever is provided for them: *Harvey* v. *Farquhar*. (1) The result is that forfeiture of the rights of one spouse gives the benefit to the other spouse, and the innocent spouse is not to be deprived of anything even in favour of children. If the decision of the Court of Session be affirmed, then the question of the annuity does not arise. However, whether the parties have contracted to make the annuity alimentary or not must depend on the words of each deed: the words here would include an alimentary annuity; and the marriage contract trustees must continue until the husband's death.

A. Graham Murray, L.A., in reply, referred to *Matheson's Trustees* v. *Matheson's Trustees* (2) and *Bowman* v. *Bowman*. (3)

The House took time for consideration.

1903. July 20. EARL OF HALSBURY L.C. My Lords, the question which arises in this case is purely a question of construction, and construction of two written documents—a statute and a marriage contract.

The marriage contract was between Mr. Gavin and Miss Walker. They were married on January 11, 1866. The

(1) 2 L. R. H. L., Sc. 192; 10 M. (H.L.) 26.

(2) (1900) 2 F. 556.

(3) [1899] A. C. 518.

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marriage was dissolved on March 14, 1885, the husband being, in the language of the statute, "the party offender." There was one child of the marriage, Anna Georgina. Mrs. Gavin died in 1899. Mr. Gavin is still alive. The marriage contract, so far as the matter now in dispute is concerned, may be very shortly stated. The wife and her father gave certain property to trustees to pay the annual proceeds to Mrs. Gavin for life, and after her death, if Mr. Gavin survived her, to her husband for life, and to pay the capital to the child or children of the marriage. Now the husband, as I have said, is still alive; but it is contended that, inasmuch as a divorce has taken place between the husband and the wife, and inasmuch as the husband was "the party offender," the child of the marriage is now entitled to the property so settled, because the husband has forfeited all right in the funds in question by reason of his being "party offending" and by the operation of the statute in that state of things.

The language of the statute thus relied on is very simple, and merely deals with the rights of the husband himself, but neither by express words nor by reasonable implication does it treat the divorce of the husband as if it were his death. In truth, the contention seeks to introduce both into the marriage settlement and into the statute words that are not there. It seeks to introduce into the settlement words limiting the property either to the death of both the spouses or to the divorce, and these latter words cannot by any reasonable construction be imported into the settlement. The construction contended for seeks also to introduce into the statute words that are not there, and, because the offending spouse is deprived of all his rights under the operation of the statute, it is sought to make that provision operate as though he were in fact dead.

The answer is a very simple one. The statute does not say so, nor anything like it, and unless such words are expressly or impliedly to be found therein it is impossible to contend that a contingency expressly dependent upon the husband's death has arisen because he has been divorced. To put such a construction on these two written instruments would be to offend against very cardinal rules of construction, and, notwithstanding the very learned argument of Lord Young, I am wholly

unable to acquiesce in so glaring a departure from the true rule for construing written instruments.

I, therefore, move your Lordships to dismiss this appeal with costs.

LORD SHAND. My Lords, I am of the same opinion, having come clearly to the conclusion that the judgment of the Court is right and should be affirmed.

The decision depends entirely on the meaning and legal effect of these few words in the statute of 1573, c. 55, in the case of divorce for desertion: "The partie offender to tyne and lose their tocher and donationes propter nuptias." The argument of the appellants is that these words are to be taken as in effect an enactment that the "partie offender" (that is in this case Mr. Gavin) is by the divorce to all effects to be regarded as dead in any question arising on the terms and provisions of his ante-nuptial contract, whether these affect the rights of his wife or of children or others as ultimate beneficiaries under the testamentary provisions of that deed. I cannot so read the statute, and I entirely agree in the views which your Lordship has expressed on that subject.

There is a forfeiture by the statute of all such pecuniary advantages as the offending spouse has gained by the contract, with the result, but with nothing more, that the other spouse acquires such rights as he or she may have under the contract free and disburdened from any such pecuniary advantages. There is no transfer of rights to any other party, or any enactment that the rights of children or beneficiaries are to be thereby created or enlarged or changed as these have been settled by the marriage contract provisions. The statute might have contained a provision that in all such questions the offending spouse shall be regarded as dead; but there is no such enactment, and anything to that effect cannot be added or implied.

Applying what I have now said, and even assuming that the provisions in favour of Mrs. Johnston had vested in her the right to the life-rent in dispute, as to which I reserve my opinion, that right is given only "on the death of the spouses," and again

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"on the death of the survivor of the spouses." The answer to the appellants' claim is that Mr. Gavin still survives, and I find nothing in the statute of 1573 which would warrant the Court in holding that he is to be regarded as dead in a question as to his daughter's provisions, because by the statute the enactment only is that he has forfeited his pecuniary rights under his marriage contract.

I may add that, having had the advantage of reading and considering the judgment about to be read by my noble and learned friend Lord Robertson, I entirely concur in what his Lordship there says.

LORD DAVEY. My Lords, in this case funds were placed in the hands of trustees by Mrs. Gavin herself and by her father, Dr. Walker, on the occasion of her marriage, upon trust to pay the annual proceeds to Mrs. Gavin during her life, and after her death to Mr. Gavin, if he survived her, during his life, and, on the death of the said spouses, to pay the capital to the child or children of the marriage subject to certain powers of appointment which need not be particularly mentioned, and subject also to a declaration that if any child should die before the said provisions should have under these presents and the exercise of the power been paid or become payable leaving issue, the said issue should have the same right to the share of the deceasing child as the parent would have had if in life.

Such are the directions to the trustees as to the disposal of the funds placed in their hands, and there is no ambiguity or difficulty in construing them. By the divorce, which took place at the instance of the wife in 1885, Gavin has lost all his interest in these donationes propter nuptias. The wife is dead, leaving Gavin surviving. There was only one child of the marriage, a Mrs. Johnston, who is still living, and it is argued that in consequence of the divorce her interest in the trust funds is accelerated, and she became entitled to have them transferred to her on her mother's death, subject only to a question which arises on Mrs. Gavin's will.

The effect of the divorce is that the settlement must thenceforth be read as if the trust for payment of the annual

proceeds to the husband were struck out of the instrument. It is difficult to see how this could affect the duty imposed upon the trustees or the directions given to them as to the disposal of the capital. I am of opinion that in these circumstances the annual proceeds during the life of Gavin are undisposed of, and there is consequently a resulting trust to the settlor or truster. It has been said that this case must be looked at in the same way as if the husband had renounced his life interest. But I take the liberty to question whether the renunciation by the husband of his life interest in trust funds like the present would have had the effect of accelerating the interests of the children, unless it could be inferred from the terms of the renunciation that it was intended to be made in favour of the children, and amount to an assignation to them. As observed by Lord Robertson in the judgment about to be read by him, this is not the case of an estate vested in fiars subject to the burden of a life-rent or an annuity. The children only derive their interests from the direction given by the truster to the trustees to pay them the capital on a given event; and in my opinion that event cannot be altered and the payment cannot be accelerated unless it can be shewn that in the events which have happened they have also become entitled to the annual proceeds in the meanwhile.

I have hitherto dealt with the case on the assumption that Mrs. Johnston has a vested indefeasible interest in the capital of the estate. But I do not think that such an assumption is in accordance with the terms of the settlement. I am of opinion that there is an effectual gift over or substitution in favour of her children in the event of her dying in her father's lifetime leaving issue. In that event her children, and not her executor, would be entitled to payment on her father's death. The Lord Advocate dismissed this point rather summarily by saying that it was decided in the law of Scotland that a substitution of issue in case of death of the institute before the period of distribution did not prevent vesting or the interest of the institute being indefeasible. With respect, I cannot agree. In the *Bowman Case* (1) there was a gift

(1) [1899] A. C. 518.

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of a share to each of four named children "or to their respective heirs." It was agreed that the "heirs" took as conditional institutes. It had been laid down by Lord M'Laren in the Court below that, if the substitutes are described as the children or the issue or the heirs of the institute, there being no ulterior destination, it did not prevent the estate vesting in the institute a morte testatoris. I will not quote my own judgment, but Lord Watson emphatically differed from that proposition. He said: "I fail to see why a gift over in favour of the heirs of an instituted child should be otherwise construed or have any different effect than a gift over in favour of another relative or of a stranger nominatim." This House came to the conclusion on the whole provisions of the will then before them (which was of a very special character) that the shares of the legatees vested a morte testatoris, though Lord Watson acquiesced in the decision with great hesitation.

In the present case the substitution is expressly made to take effect on death at any time before the period of distribution, and there is no context which should induce your Lordships to give any other than the ordinary construction and legal effect to the words. I hold, therefore, that Mrs. Johnston's right to the capital of the trust funds is liable to be defeated by her death in her father's lifetime leaving issue, and the trustees, when the time comes for them to transfer the capital, may have to do so in favour of other persons. I am of opinion that the appellants' case fails on this ground also, and that the appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, the dispute in this appeal is about money now held by the trustees under the marriage contract of Mr. and Mrs. Gavin. The marriage took place in 1866, and was dissolved in 1885 by decree of divorce obtained by the wife against the husband on the ground of desertion. The wife died in 1899; the divorced husband is still alive. There was one child of the marriage, Mrs. Johnston, who is alive, and whose marriage trustees are the appellants. The dispute is between those in right of the daughter, and those in right of the wife.

On the face of the marriage contract the daughter takes nothing until the death of the survivor of the spouses. Then the trustees are to pay over to her the capital of the money which was settled by the wife, the trustees holding it till that event, and paying the interest to the wife while she lived, and to the husband during his survivance. The claim of the daughter (through the appellants) is, that, the marriage having been dissolved by divorce for desertion, the provision of the income to the husband lapsed, and the capital became payable to her on the death of her mother.

I shall assume in the meantime that the daughter had a vested interest in the capital, and that only payment was postponed, for otherwise she has no case at all. What is her right to the accruing interest for the period between her mother's death and her father's death (which has not yet happened)? The appellants' answer is that the father is to be held to be dead, and there being no other right to the money she takes as unburdened fiar. This answer seems to me entirely fallacious.

First of all, the forfeiture by the divorced husband is by statute, this being a case of desertion, and the words of the Act, 1573, c. 55, are—the "partie offender to tyne and lose their tocher and donationes propter nuptias." Applying this enactment to the matter in hand, Mr. Gavin lost his right to the annual proceeds of this money for the period between his wife's death and his own.

This, and nothing more, is the effect on the marriage contract of the statute, read according to its terms. The result is that the trustees would still hold the capital according to the terms of the marriage contract till the husband's death, and would then pay it to the daughter. The annual proceeds during the disputed period would be undisposed of by that instrument.

But then the appellants say two things, both of which are, in my opinion, unsound arguments. First they say that the effect of the decree of divorce is the same as the death of the husband. Now what is the origin of this saying, and in what sense is it true? The origin is Stair, 1–4, 20, and what is there said is: "the party injurer loseth all benefit accruing

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through the marriage (as is expressly provided by the foresaid Act of Parliament, 1573, c. 55, concerning non-adherence), but the party injured hath the same benefit as by the other's natural death." It is nowhere said that for all purposes the husband is held to be dead. In Stair and in all the authorities the antithesis is between injurer and injured; and part of the redress to the injured is that she gets back all she had given. Thus Lord Westbury, in *Harvey* v. *Farquhar* (1), says: "The rule, I think, is this: that the interest provided by a marriage contract for the benefit of either of the spouses is by the adultery of the delinquent lost for the benefit of the other. But when we use the words 'lost or forfeited' we must remember that the interest ceases only for the benefit of the other spouse and to the extent of the provision as if the delinquent spouse were naturally dead." (Your Lordships know that the rule is the same in desertion as in adultery, and therefore this passage may be cited without reserve.) Well, in the present case, the wife gave the husband the annual proceeds of this money which she put in the hands of the trustees. The direct application of Stair's doctrine is that she gets back the right to those proceeds for the period in question, or, in other words, that the trustees hold those proceeds for her. There is, as far as I am aware, no warrant in authority and none in principle for holding that the divorce takes anything from the husband that it does not give to the wife. And the strange result of the appellants' contention is that, invoking a principle conceived in favour of the wife, they use it to give money originally coming from the wife to a third party to whom she never gave it. In truth, the appellants' argument is only another instance such as your Lordships saw lately in the *Rutherglen Poor Law Case* (2) of the danger of overdriving illustrations. Because a writer has said that the injured party has the same benefit as by the other's natural death, it comes to be said that divorce is the same as death, and all manner of deductions are drawn, not from the rule, but from the illustration.

But then the appellants have another argument. This, say

(1) L. R. 2 H. L., Sc. 192; 10 M. (H.L.) 26. (2) [1902] A. C. 360.

they, is a case of fee and life-rent, and in Scottish law life-rent is a mere burden on the fee, and once the life-rent comes to an end the fiar has necessarily the full right of enjoyment. Now it is quite true that if I convey land to A. in life-rent and to B. in fee, and both are infeft, then on A.'s death B. ipso facto comes into the full enjoyment and needs no new sasine. The two rights are not held each to be a separate estate in the land. This, as I have said, is true, but it really has no relation to the present controversy. In the case supposed, B. is vested in the estate with nothing but the life-renter's infeftment to keep him out of enjoyment. Here a sum of money is in the hands of trustees to be held until a certain event; the income again is in the hands of the trustees under a lapsed trust, and the question is one of contract. The appellants, claiming under the contract, are asking for what is expressed in the contract to be given to a third party. Nothing in the contract is left to depend on the Scottish conception of fee and life-rent, the right of the husband and the right of the daughter being specifically described as rights to certain money at certain times. Now suppose that by voluntary conveyance the husband had assigned to the wife his marriage contract right to the annual proceeds between her death and his, I cannot conceive how the daughter could have challenged her mother's right on the ground that she (the daughter) was fiar of the money. And in my opinion what the decree of divorce did was simply to give back that right to the wife just as she might have got it by assignation.

On this ground I am strongly of opinion that the appeal fails, and it is sufficient for the disposal of the case. I reserve my opinion as to the question of vesting, which I have for the purposes of the argument assumed in the appellants' favour.

A. Graham Murray, L.A., asked that the costs should come out of the estate as arranged for the expenses in the Court below.

Scott Dickson, S.-G., objected.

EARL OF HALSBURY L.C. We must follow the ordinary rule, Lord Advocate. If you have not settled it among yourselves,

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we cannot possibly do otherwise than give judgment against you in the usual form.

Ordered that the appeal be dismissed with costs.

Lords' Journals, July 20, 1903.

Agents for appellants: *Ingle, Holmes & Sons, for Alexander Morison & Co., Edinburgh.*

Agent for respondents: *John Kennedy, S.W., for Tawse & Bonar, Edinburgh.*

[PRIVY COUNCIL.]

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY . . . . } DEFENDANTS;

AND

KINGSTON . . . . . PLAINTIFF.

J. C.*
1903
July 9, 15.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Australian Customs Act, 1901, ss. 127, 192—*Construction—Using Ship Stores, Duty being unpaid—Sect.* 192 *intra vires—Penalty for breaking Seals on Ship Goods.*

Under s. 127 of the Customs Act, 1901, of the Commonwealth of Australia, a penalty is incurred for using ship stores while the ship is within the territorial waters or in the port of Melbourne, unless the duty thereon has been paid.

Under s. 192 a penalty is incurred for the act of breaking the seals, whether on the high seas or elsewhere, which had been lawfully imposed on ship goods in lieu of exacting payment of duties and entering an Australian port with the seals broken; and the section is not ultra vires the Australian Commonwealth in respect of the seals being broken outside its jurisdiction.

APPEAL from an order of the Supreme Court (Dec. 9, 1901) which entered judgment for the respondent in an action to recover penalties for offences under s. 192 and ss. 127 and 128 of the Customs Act (No. 6 of 1901) of the Commonwealth of Australia, which came into force on October 4, 1901. The action was brought in the name of the Minister of Trade and Customs of the Commonwealth, suing in the Court of the State pursuant to s. 245 of the said Act.

The main question raised was whether under the Customs Act, 1901, ships arriving at a port in the Commonwealth from other countries and bound to another port in the Commonwealth are prohibited in the ports of the Commonwealth and on the high seas between them from using ships' stores which have not been entered for home consumption—that is to say, treated as imported goods and duty paid thereon at the first

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port in the Commonwealth. If such is the true meaning of the Customs Act, 1901, the further question arose whether the Commonwealth Parliament has power to prohibit the consumption of ships' stores, at any rate outside the territorial waters of Australia, on board ships coming from abroad, but which have touched at one and are bound to another Australian port.

By s. 5 of the Commonwealth of Australia Constitution Act, 1900, it was provided that the laws of the Commonwealth should be in force on all British ships, the King's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

By art. 51 of the constitution enacted by the said Act it is provided, so far as material, as follows :—

"51. The Parliament shall subject to this constitution have power to make laws for the peace, order, and good government of the Commonwealth with respect to—

"(1.) Trade and commerce with other countries and among the States;

"(2.) Taxation, but so as not to discriminate between States or parts of States."

By art. 98 it is provided that the power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping.

The Court in substance held that under s. 192 an offence was committed by the master if a ship came into a Commonwealth port with seals broken wherever that breaking had taken place, and that as the penalty was imposed for coming into port the section so construed was within the competence of the Commonwealth Parliament to enact.

Sir R. Reid, K.C., Haldane, K.C., and *Rowlatt*, for the appellants, referred to s. 5 of the Australian Commonwealth Act (63 & 64 Vict. c. 12), and contended that the Parliament of the Commonwealth had no power in the case of ships not within the description as given in that section to authorize its Customs officer to prohibit (whether by sealing or by any other machinery) the consumption on board such ship of stores

required for its service. The consumption prohibited in this case was not a matter affecting the peace, order, and good government of the Commonwealth—more particularly when taking place in the course of a voyage and outside the limits of a port. It is not competent for the Commonwealth Parliament to create a duty which shall be observed by ships other than Australian ships upon the high seas, and enforce it by a penalty upon their entering Australian waters. Even if that is not the necessary construction of s. 5, it is a reasonable and preferable construction, so as to limit s. 192 of the Customs Act, 1901, in such a manner as to give it effect only within the Commonwealth. Sects. 127–129 and 190–192 of the Act of 1901 were referred to, and it was contended that no section prohibited the use of ship's stores for the service of the ship, and that ss. 127 and 128 on their true construction prohibited the use of ships' stores shipped in parts beyond the seas only while the same are within the jurisdiction of the Commonwealth Courts or within the control of its Customs—that is to say, within the limits of a port in Australia; and not while the ship is on a voyage between two such ports. Under s. 187 the power of the Customs officer to secure goods under seal only applies to prevent their being used in some way prohibited by the Act. And s. 192 did not impose any penalty for breaking of seals outside the jurisdiction. They referred to *Ray* v. *M'Mackin* (1); *Macleod* v. *Attorney-General for New South Wales*. (2)

Asquith, K.C., and *V. Hawkins*, for the respondent, contended that upon the true construction of s. 192 and ss. 127 and 128 of the Customs Act, 1901, and on the admitted evidence in the case, the offences charged under those sections had been committed and the penalties incurred as claimed. The enactments contained in those sections are reasonable and necessary to prevent the infringement of the revenue laws of the Commonwealth, and they bound the appellants. They were not ultra vires the Legislature of the Commonwealth as conferred by the Australian Constitution Act. By c. 1, pt. v., s. 51, that Legislature is empowered subject to

(1) (1875) 1 Vict. L. R. (Ca. at law) 274. (2) [1891] A. C. 455.

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the constitution to regulate trade and commerce with other countries and taxation: see also c. iv., s. 86. Then, inasmuch as Australian vessels pay duty on dutiable articles carried as ships' stores when coasting between ports of the Commonwealth, and oversea vessels compete with them in the coasting trade, the laws of the Commonwealth place both classes of vessels on the same footing. They require that duty shall be paid on dutiable stores brought by vessels arriving from oversea into a port of the Commonwealth if and so far as such stores are available for consumption on board the vessel before her departure from her last port of call in the Commonwealth, and that stores not so available shall be sealed up until such departure. And s. 192 includes on its true construction, it was contended, cases where the Customs seals have been broken during the passage of the ship from one port of the Commonwealth to another, although the ship may, when the seals were broken, have been at a distance of more than ten miles from land: see *The Annapolis* (1), as to a ship being compelled to take a pilot aboard when outside the three-mile limit.

Sir R. Reid, replied.

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July 15.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. The action out of which this appeal arises was brought by the Minister of State for Trade and Customs of the Commonwealth of Australia against one Charles Gadd, the master of the British merchant ship *Oceana*, belonging to the appellant company, for penalties under two sections of the Act No. 6 of 1901 of the Commonwealth of Australia, being the Customs Act, 1901.

The facts are not in dispute, and are set out in the statement of claim and admitted by the defence.

The *Oceana* had, on her arrival in the port of Sydney, goods liable to duty, and, after her arrival, more goods were shipped on board. Upon none of the goods in question were duties paid, although all of them were liable to duty, but, by the arrangement contemplated and in pursuance of the Customs Act in question, the goods were secured on board the *Oceana*

(1) (1861) 30 L. J. (Adm.) 201.

by the Customs officer by placing Customs seals upon parts of the ship in which they were stored.

After the ship left the port of Sydney for Melbourne, and while on the voyage, the defendant caused the receptacles for these goods to be opened and the Customs seals to be broken. During the voyage, and afterwards during the ship's stay in the port of Melbourne, the stores were used by the passengers and crew and for the service of the ship.

The ship arrived from Sydney at the port of Melbourne, having the seals broken without the authority of an officer of the Customs.

The plaintiff's claim was for 100*l.* by reason of the ship's entering the port of Melbourne with the seals broken; and for 50*l.* for using the stores while the ship was within territorial waters or in the port of Melbourne.

The sections under which the action was brought were the 127th and 192nd. Sect. 127 is in these words:—

"Use of Ships' Stores.

"127. Ships' stores whether shipped in parts beyond the seas or in the Commonwealth, unless entered for home consumption or except as prescribed, shall only be used by the passengers and crew and for the service of the ship and after the departure of such ship from her last port of departure in the Commonwealth."

The language just quoted prohibits the use of ships' stores by the passengers and crew or for the service of the ship unless duty is paid for them, or until the ship has departed from her last port of departure in the Commonwealth.

So far as this section is concerned the meaning is obvious enough. All goods being liable to duty upon being imported, ships' stores, which are treated as being privileged from the payment of duty, are only to be used by the passengers and crew of the ship, and even then not until after the departure of the ship from her last port of departure in the Commonwealth.

It is difficult to see what objection can be made to the authority to inflict the penalty of 50*l.* which is claimed in respect of the use of stores while the ship was within the

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territorial waters or in the port of Melbourne, in respect of which use alone the penalty is alleged by the statement of claim to have been incurred.

But the plaintiff claimed 100*l.* in respect of the offence created by s. 192. That section is in these words:—

"192. No fastening, lock, mark, or seal placed by an officer upon any goods or upon any door, hatchway, opening, or place for the purpose of securing any stores upon any ship which has arrived in any port from parts beyond the seas and which is bound to any other port within the Commonwealth shall be opened, altered, broken, or erased except by authority, and if any ship enters any port with any such fastening, lock, mark, or seal opened, altered, broken, or erased contrary to this section, the master shall be guilty of an offence against this Act.

"Penalty: One hundred pounds."

The objection urged appears to be that because the breaking of the seals took place on the high seas and outside the jurisdiction of the Australian Commonwealth, s. 192 was beyond the power of the Australian Commonwealth to enact if applied to such a case as that now under debate.

Their Lordships think that the objection is founded on a misapprehension of what the section enacts. The section assumes the lawful imposition of the Customs seals for the purpose of exempting from duty goods upon which the Commonwealth might have exacted import duties. But in ease of trade and commerce, and as a regulation for navigation, all of which subjects are within the competence of the Commonwealth Legislature, the shipowner is permitted to have on board and in Australian ports goods so sealed up that they cannot be used while the seals remain unbroken. This is a privilege accorded to the shipowner who might be compelled to pay duties in respect of all goods on board his ship. The offence created by s. 192 is the composite act of breaking the seals and coming into an Australian port with the seals broken.

When the arrangement referred to has been permitted to the shipowner for the purpose of exempting him from paying duty, it is immaterial where the act of breaking the seals takes

place. When he comes back into an Australian port with the seals broken, the offence is complete.

As Hood J. points out, the ship is, by arrangement, converted into a bond so that the stores cannot lawfully be used till the final departure of the ship.

As has been pointed out by counsel, the legislation proceeds on precisely the same lines as s. 135 of the Imperial Customs Consolidation Act, 1876, and under that section, if a foreign ship were to take goods so sealed from one bonded warehouse in the United Kingdom to another, although in the course of her voyage she might go outside the territorial limits of the United Kingdom, the very same question might arise, and upon her arrival at any other port in the United Kingdom the master would undoubtedly, in their Lordships' opinion, be liable to the penalties created by that section.

For these reasons their Lordships will humbly recommend to His Majesty to dismiss this appeal. The appellants must pay the costs of it.

Solicitors for appellants: *Freshfields.*
Solicitors for respondent: *Light & Galbraith.*

[PRIVY COUNCIL.]

J. C.* 1903 July 16.

ALGOMA CENTRAL RAILWAY COMPANY . . . . . } APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Customs Tariff Act, 1897, s. 4—*Duty on Imported Goods—Foreign-built Ship.*

A foreign-built ship bought in the United States and brought to Canada is liable to the duty imposed by the Canadian Customs Tariff Act, 1897, s. 4, Sched. A, item 409.

APPEAL from a decree of the above Court (May 6, 1902) reversing a decree of the Exchequer Court (Dec. 2, 1901).

The appellants had on May 5, 1900, paid $3500 for customs duty on the SS. *Minnie M.* under protest, and their right to recover it back (as decreed by the Exchequer Court) depended upon the true meaning of s. 2 of the Customs Act (Revised Statutes of Canada, 1886, c. 32), of ss. 3 and 4 of the Customs Tariff Act, 1897, and of Sched. A to the last-mentioned enactment. If, on the true construction of those enactments, liability to pay duty was imposed on the appellants, the further questions arose whether the Customs Tariff Act, 1897, is not inconsistent with and repugnant to the Merchant Shipping Act, 1894, so far as the Customs Tariff Act, 1897, purports to subject a British ship to the payment of duty on application for registration or completion of registration under the Merchant Shipping Act, 1894, at a port in Canada, and whether such duty is inoperative and invalid.

The Exchequer Court was of opinion that the provisions of the Customs Tariff Act, 1897, were in no way repugnant to those of the Merchant Shipping Act, 1894, but that the vessel

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

Minnie M. was not liable to the payment of duty under the provisions of the Customs Tariff Act, 1897.

The Supreme Court, in a judgment delivered by Taschereau C.J., was of opinion—(1.) That the Customs Tariff Act, 1897, is unambiguous, and puts a duty on any foreign ship imported into Canada in terms that leave no room for doubt. (2.) That the judgment of the Exchequer Court was right in dismissing the appellants' contention that the provisions of the Customs Tariff Act, 1897, were ultra vires as conflicting with the provisions of the Merchant Shipping Act, 1894. (3.) That the words "on application for Canadian register" in the Customs Tariff Act, 1897, must be construed as meaning "on application for British register in Canada." (4.) That the Government of Canada has the right to impose duties upon foreign ships and to say when, how, and by whom that duty shall be collected. That the right of the Imperial Parliament to regulate the mode of registering in Canada a foreign ship as a British ship, and the right of the Canadian Parliament to impose duties upon the importation into Canada of such ships are co-existent, and the Imperial Parliament never intended to in any way abrogate or lessen Canada's rights in the matter.

Riddell, K.C., and *Maclaren*, for the appellants, contended that the duty in question attached only to imported goods, and that the language of the Customs Act (R. S. C. 1886, c. 32), the Customs Tariff Act, 1897, and the indorsement on the customs entry, May 5, 1900, compel the inference that the term "goods" cannot include a ship. Further, it was submitted that the true meaning of the Customs Tariff Act, 1897, is not, as stated by Taschereau C.J. in the Supreme Court, "to impose a duty on every article imported into Canada," but only to impose a duty on "goods" as defined by the Customs Act (R. S. C. c. 32) when imported into Canada. It was also submitted that although railway cars, wagons, and horses may be subject to duty under the Customs Tariff Act, 1897, yet it does not follow that ships are liable to such duty. Cars, wagons, and horses may very well be within the definition of "goods" in the Customs Act (R. S. C. 1886, c. 32), which

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includes "carriages" and "animals," and does not include "vessels" or "ships," and it is to be observed that the definition in the same Act of "vehicle" does not include "vessel" or "ship."

Again, the words "on application for Canadian register," in item 409 of Sched. A to the Customs Tariff Act, 1897, are sufficient to prevent the enactments contained in the Customs Tariff Act, 1897, being so construed as to impose the duty in question. It was contended that the words "on application for Canadian registry" are clear and unambiguous, and, if it is in any way possible, effect ought to be given to such words by limiting the operation of the enactment contained in item 409 to ships built in any foreign country and in respect of which ships application for Canadian register is made.

As to the construction of taxing Acts, see *Oriental Bank* v. *Wright* (1); *Cox* v. *Rabbits* (2); *Partington* v. *Attorney-General.* (3) As to the meaning of the word "importing," see *Canada Sugar Refining Co.* v. *Reg.* (4) Interest should be allowed on money paid under protest: see *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (5); *Caledonian Ry. Co.* v. *Carmichael* (6); *Marsh* v. *Jones.* (7)

It was also contended that if any duty was imposed as contended, then the enactments are to that extent repugnant to the Imperial statute, the Merchant Shipping Act (57 & 58 Vict. c. 60), and such duty is inoperative and invalid.

Newcombe, K.C., H. G. Carroll (*Solicitor-General for the Dominion*), and *Loehnis*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In this case their Lordships think it is sufficient to express their concurrence in the judgments of the learned judges of the Supreme Court of Canada, to

(1) (1880) 5 App. Cas. 842, 856.
(2) (1878) 3 App. Cas. 473, 478.
(3) (1869) L. R. 4 H. L. 100.
(4) [1898] A. C. 735.
(5) [1893] A. C. 429.
(6) (1870) L. R. 2 H. L., Sc. 56.
(7) (1889) 40 Ch. D. 563.

which, in their opinion, it is not possible usefully to add anything.

A foreign-built ship was bought by the appellant company in the United States, and brought to Canada. An application was made for registration. When that application was made, duty was claimed on the ship as coming under the head of "goods" imported into Canada. It is difficult to see on what ground that claim could be resisted. By s. 4 of the Customs Tariff, 1897, duties are imposed on the goods enumerated in Sched. A. Sched. A. is headed, "Goods subject to Duties," and item 409 in the schedule is in these words: "Ships and other vessels built in any foreign country, whether steam or sailing vessels, on application for Canadian register, on the fair market value of the hull, rigging, machinery, and all appurtenances."

Several difficulties have been suggested. In the first place, it is said that ships are not "goods." It is not necessary to refer to or discuss the language of the Canadian Customs Act, because the Customs Tariff, 1897, itself places "ships in the schedule or list of 'goods' subject to duty." Secondly, it was argued that ships could not be "imported" into a country. It is not easy to understand that argument; this ship was brought into Canada. Nothing more can be required to satisfy the word "imported." In the next place, a difficulty was suggested with regard to the words "application for Canadian register" in item 409, the contention being that there had been no such application. Their Lordships agree with the Supreme Court in thinking that, as there was no such thing as an independent Canadian register in existence, the words must necessarily mean application for British register in Canada.

Lastly, it was urged that the enactment in question is repugnant to the provisions of the Imperial Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). Their Lordships are unable to see any repugnancy. The duty is a duty imposed on goods imported, and it is to be collected at the time when the application for registration is made; but payment of the duty is not made a condition of registration.

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Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed. The appellants must pay the costs of it.

Solicitors for appellants: *Linklater, Addison, Brown & Jones.*

Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1903 *May* 20; *June* 24.

CITY OF MONTREAL . . . . . APPELLANTS;

AND

MONTREAL STREET RAILWAY COMPANY . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH (APPEAL SIDE) FOR THE PROVINCE OF QUEBEC.

Contract—Construction—Duty of clearing Track of Ice and Snow—Right to clear Ice and Snow into the Streets—Electric Sweeper.

The city council of Montreal being bound as the road authority to remove the ice and snow on the streets from curb to curb, including the snow thrown or falling thereon from the roofs of houses and removed thereto from the side walks:—

Held, that the respondent street railway company, having contracted with the city to keep their track free from ice and snow, did not, having regard to the surrounding circumstances and in the absence of words expressly or impliedly forbidding it, commit a nuisance by sweeping their snow into the street.

Ogston v. *Aberdeen District Tramways Co.*, [1897] A. C. 111, distinguished.

Held, also, that the city having granted to the company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets in the manner successfully in use elsewhere, the latter could not be prevented from using the electric sweepers.

APPEAL from a judgment of the above Court (Dec. 27, 1901) affirming a judgment of the Superior Court (Dec. 26, 1900)

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

given on a submission thereto under the Code of Civil Procedure, art. No. 509, in the matter of a contract between the parties to the submission dated March 8, 1893. The questions submitted and the circumstances under which they arose are stated in their Lordships' judgment.

The answers given by the Courts below were—

"(*a*) That the company is bound to keep its tracks clear from ice and snow, but not to remove or cause to be removed from the streets and convey elsewhere the snow which is so cleared from its tracks.

"(*b*) That the company without the permission of the city council can use, for the purpose of clearing the snow or ice from its tracks, electric sweepers, rotary brushes, or other similar apparatus which sweeps said snow or ice into the street."

Blake, K.C., and *Ethier, K.C.*, for the appellants, contended that on the true construction of the contract the respondents were bound to keep their tracks free from ice and snow. They were not entitled in doing so to deposit and leave the ice and snow on the rest of the street. Their system of clearing must involve as part of the whole operation the removal of the snow bodily from the whole width of the street. Under art. 30 of the contract the appellants were entitled to prescribe the method of clearing, and, therefore, to prescribe such a method as would involve a complete clearance. The true interpretation of the contract did not impose on the appellants any obligation, but left it entirely to their discretion to remove from the street the ice and snow which had been cleared by the respondents from their tracks. Reference was made to *Ogston* v. *Aberdeen District Tramways Co.* (1) in support of the contention that the respondents' conduct amounted to a nuisance. Further, art. 2 of the contract did not on its true construction include a grant to the respondents of the right to use electric sweepers which damage the pavements and do not cut away the ice. The respondents are not authorized by the terms of the contract, and without the leave of the appellants, to use in

(1) [1897] A. C. 111.

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clearing their tracks any apparatus which does not answer the purpose of also clearing the streets.

Asquith, K.C., and *C. S. Campbell, K.C.*, for the respondents, relied upon arts. 3, 16, 30, and 48 of the contract. By the clear terms of art. 16 the respondents are only bound to clear the snow and ice from their tracks, and are not bound to remove them altogether from the streets. The appellants have the option of clearing the streets if they see fit, and if they elect to do so they can under the contract recover half the cost of doing so from the respondents. As regards the electric sweepers, they are appliances within the meaning of art. 3 which the respondents are thereunder entitled to use. The evidence shews that they are the only appliances which would enable the respondents to clear their tracks during winter time, and they are in use in the northern cities of Quebec, where alone the climatic conditions resemble those of Montreal.

Blake, K.C., replied.

1903 *June* 24.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Under a contract dated March 8, 1893, expressed in English and made between the Montreal Street Railway Company and the city of Montreal, embodying a by-law (No. 210) passed by the city on December 21, 1892, the company has established and is now operating lines of railway in Montreal for the conveyance of passengers by means of electric cars.

In order to determine a controversy as to their relative obligations under this contract, both parties agreed to submit to the Court under art. 509 of the Code of Civil Procedure, Province of Quebec, the following questions :—

"(*a*) Whether the company is bound not only to keep its tracks clear from ice and snow, but also to remove or cause to be removed from the streets and convey elsewhere the snow which is so cleared from its tracks?

"(*b*) Whether the company without the permission of the city council can use for the purpose of clearing the snow and ice from its tracks any electric sweepers, rotary brushes, or

other similar apparatus which sweeps said snow or ice on to the street?"

The Superior Court answered both questions in favour of the company. The Court of King's Bench affirmed the decision of the Superior Court, Ouimet J. dissenting.

The answer to the two questions submitted to the Court depends mainly on the three following articles of the contract, to each of which is subjoined a reference to the corresponding section of by-law No. 210, which is expressed in French.

Art. 3. "The city shall grant the said company all licences, rights, and privileges necessary for the proper and efficient use by electric power to operate cars in the said streets in the manner successfully in use elsewhere, including the right to open said streets for the purpose of inserting and maintaining, and to insert and maintain, poles for supporting the wires conveying electric power, but only for the service of their cars and not otherwise, provided that the said city be not bound to supply any land, water, or other property whatever." (By-law s. 2.)

Art. 16. "The company shall under instructions from the city keep their track free from ice and snow, and the city may at its option remove the whole or such part of ice and snow from curb to curb as it may see fit from any street or part of street in which cars are running, including the snow from the roofs of houses thrown or falling into the streets, and that removed from the side walks into the streets with the consent of the city, and the company shall be held to pay one-half of the cost thereof." (By-law s. 30.)

Art. 30. "The cars will be held to run the year round without interruption; but should this prove impracticable during the winter season, sleighs may be substituted for cars at the option of the city council." (By-law s. 25.)

The only other articles to which it is necessary to refer as bearing on the relations between the city and the company are arts. 36, 48, and 42.

By art. 36 the company agreed to pay to the city a percentage upon the total amount of its gross earnings, rising gradually from 4 per cent. of its gross earnings up to $1,000,000 to 15 per cent. above $15,000,000. (By-law s. 35.)

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By art. 48 it was declared that by-law No. 148, which had formerly governed the relations between the company and the city, was repealed, and that the company relinquished all privileges under it and all contracts and arrangements entered into between the company and the city "in order that they may be absolutely subject to the present contract dating from the date hereof." (By-law s. 42.)

The duration of the contract was to be the period of thirty years from August 1, 1892 (art. 42). At the expiration of that period, and at the end of every subsequent period of five years, the city was to have the option of taking over the undertaking at a valuation.

In the region of Montreal there is a long cold winter and a heavy snowfall. The practice is to give up wheeled traffic during the winter time and to use sleighs.

For many years before 1893 the company had worked its traffic by horse power. No attempt was ever made at that time to keep the track of the railway open in winter. The company used sleighs as everybody else did. The sleighs ran on the snow under which the track was buried. The snow in the streets beaten down by the traffic stood at a height of about 18 inches or so. Some surface snow was occasionally removed when the fall was very heavy; but, generally speaking, the city, as the street authority, did little more during the winter than level the roadway, clearing off the inequalities caused by the masses of snow falling from the roofs or removed from the side walks. It was not until the breaking up of the frost in spring that the snow and slush were carted away from the streets in order to prevent flooding in cellars and basements of houses.

The introduction of electricity has altered the situation altogether. By means of electrical cars furnished with rotary brushes always ready, started at the beginning of a snowstorm and kept moving to and fro night and day until the snow ceases to fall, it becomes practicable to keep the track open during the winter. The effect of clearing the track is to leave a trench or ditch in the middle of the street dangerous for ordinary traffic. The only thing to be done to prevent continual accidents is to

take away the snow in the streets to within about 6 inches of the ground, as it is not possible to leave more than 5 or 6 inches on the track between the rails. It was in view of this change of circumstances and methods that the contract of March 8, 1893, was made.

During the winter of 1893–4 the company, at the request of the city, did all the carting, and the city afterwards repaid the company one-half of the cost of the work. This system proved unsatisfactory, and so the city itself undertook the work. Differences, however, soon arose between the city and the company as to the true interpretation of the contract. The city insisted that if the cost of clearing the streets was to be divided equally, it would throw upon it more than a fair share of the expense. After some negotiation an agreement was made, to last for five years, that the company should contribute every year a fixed sum per mile. When this agreement came to an end, the differences between the two parties were renewed, and ultimately, as already stated, these differences were submitted to the Court for decision.

The contention on the part of the city council was that the company ought to pay at least two-thirds of the expense instead of one-half. They put their case in two ways. They maintained that the company was bound not merely to keep its track clear of snow and ice, but to remove from the streets altogether the snow and ice cleared off its track. In the event of this contention failing, they insisted that, inasmuch as it was provided that the company should keep its track clear "under instructions from the city," it was competent for the city to prohibit the use of electric brushes and other similar appliances, and so to bring the company to terms.

The Superior Court and the Court of King's Bench rejected both the contentions of the city. As regards the second point, the Court of King's Bench held that the provision as to "instructions from the city" applied only to the extent of the work to be done, and not to the mode to be adopted for its accomplishment. As to the first point, both Courts held that the company was merely bound to keep its track free from snow and ice, and under no obligation to take away the snow

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and ice from the street. They thought it clear "que l'intention et l'objet des deux parties étaient de considérer la neige qui tombe sur les toits, les trottoirs, et la rue, et la glace qui se forme sur cette dernière comme une seule et unique masse, et de diviser en deux parts égales le coût du transport de tout ce qui devrait en être enlevé d'un trottoir à l'autre—from curb to curb, including the snow from the roofs, and that removed from the side."

Agreeing entirely in the reasons appearing in the judgment of the Court of King's Bench delivered by Blanchet J., and in the observations added by Sir Alexander Lacoste C.J., their Lordships do not think it necessary to do more than express very briefly their concurrence in the conclusions arrived at by the Courts of Quebec.

It seems to their Lordships that there is really no difficulty in ascertaining the meaning and effect of art. 16 of the contract. The learned counsel for the appellants laid great stress upon the fact that the contract does, in the clearest possible terms, leave the removal of ice and snow to the discretion of the city council. "The city may, at its option, remove the whole or such part of ice and snow from curb to curb as it may see fit from any street or part of street in which cars are running." It is a mere option, it was said, and nothing more. That is perfectly true as between the city and the company. The city is under no obligation to the company as regards the removal of the snow. It is not a matter in which the company has much interest. To the shareholders it would be no loss of profit, and perhaps not a matter of much regret if the streets on which the electric cars are running were impassable to all vehicular traffic except its own. But it must have been within the contemplation of both parties that, as soon as the company cleared its track, it would be incumbent on the city, in the discharge of its duties as the road authority, to remove the snow from the streets so as to make them safe for ordinary traffic. The obligation of the city is an obligation to the public, not to the company, but for all that it is an obligation which the city council cannot decline or neglect. It seems to their Lordships that, when this is borne in mind, art. 16

becomes clear enough. It describes a continuous operation. Once begun, the work must go on. The company and the city take different and separate parts. But the operation is a combined operation, and in the result the work is to be paid for jointly. The company is bound to clear its track. There is no provision as to how it is to be done. Seeing that the inhabitants are permitted to tumble snow from the roofs of their houses into the street, and to throw into the street snow from the side walks, it would be almost absurd to contend that the company, clearing its track for the benefit of the city as well as for its own benefit, is not at liberty to sweep the snow into the street. There are no words expressly or impliedly forbidding it to do so. The option of the city (which is really an obligation, though not an obligation to the company) is to remove the snow "from curb to curb." Between those limits, of course, is included the company's track.

In connection with this part of the case an argument was advanced at the bar which does not appear to have been advanced in the Courts of Quebec. It was an argument founded upon the case of *Ogston* v. *Aberdeen District Tramways Co.* (1) In that case it was held that a tramway company was committing a nuisance, not merely by flooding the streets with briny slush injurious to the feet of horses, but also by piling snow from its track in ridges or lumps upon the surface of the streets. The argument as put forward at their Lordships' bar seemed to be an argument drawn, not so much from the principles laid down in the House of Lords, as from the facts of a particular case where the surrounding circumstances were different. It by no means follows, as indeed a careful perusal of the Scottish case will shew, that what is a nuisance in Aberdeen would be a nuisance in Montreal. In Aberdeen winter snow is not permanent. In Montreal it is, and the inhabitants are invited, or at any rate permitted, to throw the snow which is an inconvenience to them into the middle of the streets. Be this as it may, if the true construction of the contract be (as their Lordships think it is) that the company is permitted by the street authority to clear the

(1) [1897] A. C. 111.

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snow from its track by sweeping it into the street, there can be no room for the contention that that operation is to be treated as a nuisance.

As regards the second question, their Lordships also agree with the Courts of Quebec. The contention of the city that, in order to exact terms which they would consider more equitable, they are entitled to put pressure upon the company by refusing to allow it to use the readiest and best, if not the only, means of doing that which it had contracted to do, is not a contention which commends itself to their Lordships. There is, however, no foundation for the position assumed by the city. The city granted to the company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets "in the manner successfully in use elsewhere." It is in evidence that electric sweepers are the only appliances which could enable the company to run its cars all the year round without interruption as required by art. 30 of the contract. These electric sweepers are in use in Quebec, Ottawa, Toronto, St. Paul, Minneapolis, and Winnipeg, where the climatic conditions are much the same as those in Montreal. Their Lordships think that the use of these appliances is authorized by the provisions of art. 3 of the contract, and that no further authority from the city is required.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Paines, Blyth & Huxtable.*

[PRIVY COUNCIL.]

DUFFILL AND ANOTHER . . . . . DEFENDANTS;

AND

DUFFILL . . . . . PLAINTIFF.

J. C.*
1903
June 24;
July 7.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Will—Construction—Contingency of either Son dying before his Brother—Clause of Substitution.

The testator, after dividing equally his residuary estate between his two sons, directed that "in the event of either of my two sons dying before his brother without legitimate issue, then his share shall become the property of his surviving brother; but if there are any legitimate children surviving their father, then" for their benefit as directed:—

Held, that the bequest created a vested interest in the sons, but one liable to be divested as to the son first dying (whether before or after the testator's death) in favour of the objects named in the clause of substitution.

APPEAL from a decree of the Supreme Court (Sept. 30, 1902) in regard to the construction and effect of the will of Charles Christian Duffill, deceased, dated December 28, 1895.

The Supreme Court declared that the appellant and the respondent, the two sons of the testator, were under his will entitled to the residue of his estate in equal shares.

The Chief Justice, with whom Finnemore J. agreed, stated as his reasons that the testator had first used words which would on his decease absolutely vest his property in his sons, and that they were unambiguous, and that the words of the following clause being ambiguous were insufficiently clear to deprive his sons of the benefits that he had bequeathed to them by the preceding clause, and that if the testator's intention had been that there should be no vesting of the estate till one of the sons had died, surely he would have used words which would have had the effect of disposing of the usufruct of the estate pending that event, which he did not do, that he did not

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

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think that a fidei-commissum was created, and that he could see no words justifying the conclusion that a trust under the Roman-Dutch law had been created. Beaumont J. differed from the other judges, and thought that the will did create a fidei-commissum, and that no other reasonable construction could be placed upon it, and that the Court was not justified in importing, as the other judges held, into the will the words "in the event of one of my sons predeceasing me without legitimate issue," and substituting them for the words in the will, which were, "in the event of either of my two sons dying before his brother without legitimate issue," and that such an interpretation would render nugatory the whole of the stipulations which follow in the remainder of the will.

Upjohn, K.C., and *Alfred Whitaker*, for the appellant, contended that the provisions of the latter of the two paragraphs of the will set out in their Lordships' judgment, and beginning "in the event of either of my two sons," are not confined, as erroneously held by the majority of the Court, to the event of the death of a son under the circumstances mentioned and in the lifetime of the testator. To import into the clause the condition of the son predeceasing the testator does not give effect to the provisions of the said clause in favour of the children of a son who dies leaving children. They relied on the reasons of Beaumont J., and referred to *O'Mahoney* v. *Burdett* (1); *Bowers* v. *Bowers* (2); *Galliers* v. *Rycroft* (3), citing *In re Milne*. (4)

W. E. Vernon, for the respondent, contended that on the true construction of the said clause it was only to come into operation in the event of the death of either of the sons during the lifetime of the testator. If the appellant's contention is correct, there is no disposition in the will of the usufruct of the property during the period between the testator's death and the death of one of his sons. It was contended that no fidei-commissum was created by the will, and ought not

(1) (1874) L. R. 7 H. L. 388, 393, 400.
(2) (1870) L. R. 5 Ch. 244.
(3) [1901] A. C. 130.
(4) (1880) 1 Natal L. R. 88; (1882) 3 Natal L. R. 56.

to be presumed without clear words imposing it. He cited *Clayton* v. *Lowe* (1); *Edwards* v. *Edwards*. (2) [LORD DAVEY. Lord Romilly laid down specific rules of construction, No. 4 of which was overruled in the House of Lords in *O'Mahoney* v. *Burdett* (3).] And see the cases cited on p. 397 of that case. See also *Peard* v. *Morton*. (4)

Upjohn, K.C., replied.

The judgment of their Lordships was delivered by

LORD DAVEY. Charles Christian Duffill, deceased, made his will dated December 28, 1895, and thereby, after giving a legacy of 200*l.* to his wife in the event of her surviving him, disposed of the residue of estate as follows:—

"I also bequeath to my two sons, namely, John Henry Duffill and Charles Duffill, after all my legitimate debts and funeral expenses have been paid and the two hundred pounds sterling (200*l.*) to my wife (should she then be alive), the whole of my property of any kind whatsoever to be divided equally between my aforesaid two sons John Henry and Charles as my executors shall deem fair and equitable.

"In the event of either of my two sons dying before his brother without legitimate issue, then his share shall become the property of his surviving brother; but if there are any legitimate children surviving their father, then their father's share shall be invested in any way my executors shall deem best. The interest to be used for the education and maintenance of the said children until the youngest attains the age of twenty-one years, then the residue to be equally divided."

The testator appointed as trustees and executors to his will John Henry Duffill, one of his sons, and one Edwin Almond.

The only question which has been argued on this appeal is the proper construction of this will in accordance with the principles of Roman-Dutch law as administered in Natal.

Two of the learned judges in the Supreme Court have held that the substitutionary clause was intended to take effect

(1) (1822) 5 B. & Ald. 636; 24 R. R. 509.
(2) (1852) 15 Beav. 357.
(3) L. R. 7 H. L. 388.
(4) (1883) 25 Ch. D. 394.

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only in the event of one of the sons dying in the testator's lifetime. The other judge, Mr. Acting Justice Beaumont, held that the effect of the clause was to burden the share of the son who died first with a fidei-commissum. By the order of the Court, dated September 30, 1902, it was declared that the sons were entitled to the residue of the estate in equal shares (meaning that they were entitled absolutely), and the costs of both parties were given out of the estate.

It must be admitted that the words used by the testator will bear either construction, and also that the Court should be slow to impose a fetter on the alienation by the heir or legatee of his estate.

Their Lordships, however, think that the opinion of the dissenting judge is more in accordance with the language used by the testator than the construction adopted by the majority. In the first place, the event on which the substitution is to take place of "either of my sons dying before his brother" primâ facie means death at any time, and you would require to interpolate or imply words to confine it to death in the testator's lifetime. And if the testator meant merely to provide for a lapse, the natural way of expressing such an intention would not be to speak of death of one before the other (which would be immaterial), but death in his (the testator's) lifetime, and you would expect the clause to go on to provide for a lapse of the whole estate by the death of both sons. Again, the words "his share" and "become the property" are more appropriate to a share already acquired by the deceased son, and to a devolution or change in the property of that share, although, if the meaning were otherwise clear, the words might no doubt be interpreted as meaning the share to which the son would have become entitled if he had survived.

Their Lordships are not impressed by the difficulty which seems to have been felt by the learned Chief Justice, that the testator had not disposed of the usufruct of the estate pending the happening of the event, nor do they agree that the vesting of the estate is postponed. The testator bequeaths the property (including the usufruct) to his two sons. Their Lordships hold that this bequest creates a vested interest in the

sons, but one liable to be divested as to the share of the son first dying in favour of the objects named in the clause of substitution.

Their Lordships abstain from expressing any opinion as to the practical consequences of the construction which they have placed on the will, because that is a question of the law and practice of the Courts of Natal on which they have not heard argument. Probably as the property consists of freehold land, and the will will form part of the title, no difficulty will arise.

Their Lordships will, therefore, humbly advise His Majesty that the order of September 30, 1902, ought to be varied by adding to the declaration therein contained the words following (that is to say): "but, subject to a fidei-commissum in the events and in favour of the objects mentioned in the clause of substitution in the said will contained," and that with this amended declaration the cause ought to be remitted to the Court below for further consideration.

The appellants, who are executors of the estate, will take their costs of the appeal, to be taxed as between solicitor and client, out of the estate. The respondent will bear his own costs of the appeal.

Solicitors for appellants: *Loughborough, Gedge, Nisbet & Drew.*

Solicitors for respondent: *Kimbers & Boatman.*

[PRIVY COUNCIL.]

J. C.* 1903 July 8, 28.

HENRY GRAVES & CO., LIMITED . PLAINTIFFS;

AND

GORRIE . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Imperial Fine Arts Copyright Act, 1862—*Canada Copyright Act*, 1875—*Copyright within the United Kingdom.*

The Imperial Fine Arts Copyright Act, 1862, confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs. It extends to the whole of the United Kingdom, but does not extend to any part of the British dominions outside the United Kingdom.

Tuck & Sons v. *Priester*, (1887) 19 Q. B. D. 629, approved.

There is nothing in the Canada Copyright Act, 1875, or in the International Copyright Acts, which conflicts with this view.

APPEAL from a decree of the above Court (April 12, 1902) affirming a decree of the Divisional Court.

The action was brought for an injunction to restrain the respondent from infringing the alleged copyright of the appellants in the picture known as "What we have we'll hold," and for damages for such infringement, and to recover the penalties under the Fine Arts Copyright Act, being 25 & 26 Vict. (Imp.) c. 68.

The question decided by the Canadian Courts and by their Lordships was whether the appellants' copyright extends to Canada. The Canadian Courts held that the copyright given by 25 & 26 Vict. c. 28 is limited to the United Kingdom, and does not extend to confer on the appellants a copyright in the Dominion of Canada.

Haldane, K.C., *Scrutton, K.C.*, and *Beven*, for the appellants, contended that the Imperial Act extended the rights of the

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

British author of an artistic work with copyright in the United Kingdom to all the dominions of the Crown. The words of s. 1 on their true construction operated to that effect, and the Fine Arts Copyright Act, 1862, and the International Copyright Acts, 1844 to 1886, are to be regarded as a code under which every British author of an artistic work who has obtained copyright in the United Kingdom acquires a copyright in every part of the British dominions. The Act of 1886, namely, 49 & 50 Vict. c. 33, was especially relied on as extending the scope of the Act of 1862 (if by its true construction limited as contended on the other side) so as to confer copyright throughout the British dominions. The Order in Council of November 28, 1887, to which the Berne Convention is scheduled, is to be taken as incorporated with the Act of 1862, and to include the Imperial as well as the International Copyright Acts, and to extend artistic copyright throughout the British dominions. Reference was also made to the Canada Copyright Act, 1875, s. 3, and to *Smiles* v. *Belford* (1): see also *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos.* (2)

J. H. Denton, for the respondent, contended that on the true construction of the Act of 1862 its operation was confined to the United Kingdom, and did not extend to or possess any force or effect in Canada. Even if it did extend to the Colonies, it has been superseded or in effect repealed by the Canadian Act of 1875 (38 Vict. c. 88), passed in pursuance of the powers conferred by the British North America Act, 1867, s. 91, which specifically mentions copyrights, and assented to under authority of special Imperial legislation, namely, by 38 & 39 Vict. c. 53. The International Copyright Act of 1886 does not deal with the question of extending the British Copyright Acts to the Colonies, and does not extend them. By Canadian copyright law, an artistic work must be produced or reproduced in Canada, and must be recorded as by law provided. He referred to *New Zealand Loan Co.* v. *Morrison.* (3)

Haldane, K.C., replied.

(1) (1877) 1 Ont. App. Rep. 436. (2) [1891] A. C. 460.
(3) [1898] A. C. 349.

J. C. 1903 GRAVES & Co., LIMITED v. GORRIE.

July 28. The judgment of their Lordships was delivered by

LORD LINDLEY. The appellants and plaintiffs in this case are the registered owners of the copyright of a picture called "What we have we'll hold." They acquired this copyright under statute 25 & 26 Vict. c. 68, commonly called the Fine Arts Copyright Act, 1862. They have not complied with the Canadian Copyright Act, and have acquired no copyright in Canada apart from the copyright to which the statutes of the United Kingdom entitle them. The defendant is a printer and publisher in Toronto, and he has printed, published, and sold in Canada copies of the plaintiffs' picture without obtaining any licence from them. The plaintiffs complained of this as an infringement of their copyright, and they instituted legal proceedings in Canada against the defendant for an injunction and damages. The case was heard in the High Court of Ontario, and the plaintiffs' application for an injunction was dismissed with costs. An appeal to the Divisional Court was unsuccessful. A further appeal to the Court of Appeal met with no better fate. The Courts in Canada decided that the plaintiffs had no copyright in Canada. The present appeal has been brought in order that this decision may be reconsidered and finally reviewed.

The question depends entirely on the true construction and effect of the Act of 1862 before referred to. Other statutes were called in aid by the appellants' counsel and will be noticed presently, but they do not extend the rights conferred by the Act of 1862.

The Act of 1862 begins by reciting (as their Lordships believe, quite accurately) that the authors of paintings, drawings, and photographs had, as the law then stood, no copyright in such works, and that it was expedient to amend the law in that respect. Then follows s. 1, which confers copyright in such works on their authors, being British subjects or resident within the dominions of the Crown. Copyrights in such works and assignments of such copyrights have to be registered in Stationers' Hall; and no one is entitled to the benefit of the Act until registration (s. 4); penalties are imposed on persons who infringe such copyright (see ss. 6, 7, and 8); facilities are

given for obtaining injunctions (s. 9); importations into the United Kingdom are prohibited (s. 10); the remedy by action for damages is preserved (s. 11); and the then International Copyright Act (7 & 8 Vict. c. 12) is incorporated.

The Act of 1862 confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs. Such copyright extends to the whole of the United Kingdom. But there is not a word in the Act to indicate any intention on the part of the Legislature to extend the limits within which the copyright is to be enjoyed to any part of the British dominions outside the United Kingdom. There are clauses, especially s. 4, relating to registration, and s. 10, prohibiting importation, which negative any such intention. In the absence of language clearly shewing an intention to confer copyright in such dominions, their Lordships are of opinion that the plaintiffs' contention cannot be supported.

This view of the Act is by no means new. It was adopted in *Tuck & Sons* v. *Priester* (1), in which the effect of non-registration and of the penal clauses had to be considered. The appellants' counsel, however, called in aid some other statutes, and notably the Canada Copyright Act, 1875 (38 & 39 Vict. c. 53), s. 3, and the International Copyright Acts.

The Canada Copyright Act, 1875, does not, by s. 3, make the Canadian Act set out in the schedule an Imperial Act applicable to Canada. The section simply removes a difficulty which had arisen in Canada by reason of s. 91 of the British North America Act and some Orders in Council. Copyright is placed by that Act under the Dominion Legislature; and, having regard to some Orders in Council, it was doubtful by whom the Act in the schedule should be assented to. The effect of the Act was considered by the Court of Appeal for Ontario in *Smiles* v. *Belford* (2), and it is plain from that case, and indeed from the Act itself, that it in no way assists the plaintiffs.

The International Copyright Acts, and especially the Act of 1886 (49 & 50 Vict. c. 33), were relied upon with the view of

(1) 19 Q. B. D. 629. (2) 1 Ont. App. Rep. 436.

J. C. 1903 GRAVES & Co., LIMITED v. GORRIE.

shewing that, unless the Act of 1862 were held to confer copyright, not only in the United Kingdom, but also in the British dominions, unforeseen anomalies would arise, and those Acts would not have the effects intended under the Berne Convention. It is unfortunately true that the International Copyright Acts and the Berne Convention give rise to many serious difficulties when they have to be applied to particular cases. But their Lordships are unable to discover any language in those Acts which, without more, extends the area of the copyright conferred by the Act of 1862 on British subjects and persons resident in British dominions to any country beyond the limits of the United Kingdom.

The short result is that those who want copyright in Canada for paintings, drawings, and photographs must obtain such copyright by complying with the laws of that country. There is no difficulty or expense worth mentioning in doing this.

Their Lordships will, therefore, humbly advise His Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitors for appellants: *Eardley, Holt & Hulbert.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

YOUNG, MASTER OF SS. "FURNESIA" PLAINTIFF; J.C.*

AND 1903

THE SS. "SCOTIA" . . . . . DEFENDANT. *July* 14, 15, 16.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Salvage Services—Ship Salved the Property of the Crown—Action not maintainable.

Where a ship is the property of the Crown, no action in rem or otherwise for salvage can be maintained. The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by statute.

APPEAL from a decree of the above Court (June 28, 1902).

The appellant, as master of the SS. *Furnesia* and acting on behalf of the owners and crew of the *Furnesia*, instituted an action in rem against the SS. *Scotia* in the Supreme Court of Newfoundland for the recovery of salvage remuneration for services admittedly rendered by the *Furnesia* to the *Scotia* in the North Atlantic Ocean on September 19 and 20, 1901.

The Court found on the facts that salvage services of a valuable and meritorious character, and deserving of a high and liberal award, had been rendered by the *Furnesia* to the *Scotia*, but held that the *Scotia* was at the time of the salvage services, and still was, the public property of the Dominion of Canada, and therefore the public property of His Majesty, and could not be arrested or proceeded against in a claim for salvage.

Sir R. Reid, K.C., Butler Aspinall, K.C., and *C. R. Dunlop*, for the appellant, contended that the finding that the *Scotia* was the property of the Government of the Dominion of Canada was not sufficient in law to support the conclusion

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR ARTHUR WILSON.

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that the *Scotia* was the public property of His Majesty, or was exempt from the jurisdiction of the said Court in a claim in rem for salvage. The *Scotia* was not a public ship used for public purposes. She did not belong to the class of ships which have immunity from civil or Admiralty jurisdiction; but was a ferry-boat constructed and intended to be used exclusively for trading purposes, and incidentally to and as part of the plant of a railway owned or managed by a department of the Government of Canada, for the purposes of gain and subject to the ordinary duties and liabilities of a railway company incorporated by statute. At the time of the salvage services and of her arrest the *Scotia* was in the possession and control of the builders by their servants, and was subject to their liens and right of resale for the balance of the purchase price under the building contract, and to their right of cancelling the contract, and had not acquired any public character nor entered on any public service. On the contrary, the ship was subject to all maritime liens which might attach to her while in the possession of the builders, who were pro hac vice the owners. The ship did not pass into the possession of the Minister of Railways and Canals until after she was released from arrest. It was further contended that if the *Scotia* was privileged from arrest, the privilege was waived by her owners appearing without protest, putting in bail, and filing a defence submitting to the jurisdiction of the Court. Reference was made to *The Parlement Belge* (1); *The Cybele.* (2) As to waiver of privilege from arrest by the Crown, see *The Ripon City* (3); *The Swift* (4); *United States* v. *Wilder* (5); *The Charkieh.* (6)

Newcombe, K.C., and *Loehnis*, for the respondent, contended that the judgment was right, and in accordance with the ruling in *The Parlement Belge* (1), which was approved in *Morgan* v. *Castlegate Steamship Co.* (7) and *The Utopia.* (8) They referred to Admiralty Practice, 3rd ed. p. 179, and the

(1) (1880) 5 P. D. 197.
(2) (1878) 3 P. D. 8.
(3) [1897] P. 226, 236.
(4) (1813) 1 Dodson, 320, 339.
(5) (1838) 3 Sumner, 308.
(6) (1873) L. R. 4 A. & E. 59.
(7) [1893] A. C. 38, 52.
(8) [1893] A. C. 492, 499.

cases there cited; *Mighell* v. *Sultan of Johore* (1); *Gilbert* v. *Corporation of Trinity House* (2); *The Marquis of Huntly*. (3) There is no authority for limiting the immunity relied upon in this case to national property in actual use for national purposes. It applies to all property of the Crown. Reference was made to *The Tasmania*. (4) As regards the contention that the *Scotia* was not the property of the Crown because she was used as a ferry-boat for trading purposes, as part of the plant of a railway company, it was clear that both land and railway belonged to the Crown: see the British North America Act, 1867, s. 145, and R. S. C. c. 37, ss. 1, 2, 6; c. 38, ss. 1, 4, 5, 45, 67; and c. 39, ss. 2, 5.

Sir R. Reid replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal from a judgment of the Supreme Court of Newfoundland in a salvage suit in which the SS. *Scotia* was arrested for salvage services. The salvage services, which will be referred to hereafter, were of no ordinary character, but the only question of law before the Board is whether the vessel so arrested was, or was not, liable to seizure, she being (as it is alleged) the property of the Crown. The *Scotia* was built for the Crown upon a contract which is before their Lordships, and the first piece of evidence which (it is suggested) makes the ship—at all events for some period of her existence—not the property of the Crown, although she was built for the Crown and money was paid for her on behalf of the Crown, is that the money had not been paid in its entirety at the time when this question arose. Their Lordships are not disposed to give any weight to that consideration. Even if the ship was still in the possession of the builders and subject to the builders' lien for the unpaid balance, that would not, in their Lordships' opinion, affect the question arising on this appeal. The seizure is intended to be a preliminary to the sale of the ship, and what would be sold would not be the mere possession, but the proprietary right. If the proprietary right

(1) [1894] 1 Q. B. 149, 152, 154, 199.
(2) (1886) 17 Q. B. D. 795, 801.
(3) (1835) 3 Hagg. 247.
(4) (1888) 13 P. D. 110, 115.

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could not be sold by reason of the ship's belonging to His Majesty, the question of possession may be passed by as immaterial.

But their Lordships are not disposed to take the view that there was any such possession independent of the proprietary right of the Crown. If there was anything exceptional or unusual in the contract, or not in accord with its provisions, that was a question of evidence which ought to have been dealt with at the trial. The natural presumption from the contract, apart from any evidence to the contrary, is that its provisions were followed. One of these provisions was that possession should be given to the Crown immediately after the trial trip, if such trip proved satisfactory. There was an ancillary provision for the passage of the ship across the Atlantic, which, however, was not necessarily to be carried out by the builders, but only if the parties should agree at the proper time, and elect that that should be the mode of delivery. In that case, from the moment such delivery took place, the persons navigating the ship and acting on her behalf were doing so as servants, or agents, of the Crown. But the possession would then be in the Crown; and although their Lordships are not disposed to think any different question would arise, whether the possession was in the Crown or in the builders at the moment, it is as well that that matter should be cleared up upon the evidence which is now before their Lordships. Their Lordships are of opinion that the reasonable presumption arising upon the facts before them is that the possession was in the Crown, and not in the builders. If the proprietary right was in the Crown, the matter before their Lordships is reduced to one of those propositions of law which are almost beyond the reach of argument. The question has been discussed in the Courts for a very long period, and after the catena of authorities that have been brought before their Lordships, it is vain to argue that, where the property belongs to the Crown, the Crown can be impleaded, whether in this form or in any other form. Where you are dealing with an action in rem for salvage, the particular form of procedure which is adopted in the seizure of the vessel is only one mode of impleading the

owner, and if the owner is the King the action cannot be maintained, since it is impossible to contend that the King can be impleaded in his own Courts. The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by statute. This is not one of the cases so provided for, and it is, therefore, impossible to maintain that the power of seizing a vessel belonging to the Crown can be exercised as against the Crown.

It is, however, suggested that, although (speaking in the widest sense) the Crown cannot be impleaded, this particular vessel, under the circumstances of its employment, was not, strictly speaking, a vessel belonging to the Crown. In support of this proposition counsel for the appellant cited the case of *The Cybele*. (1) Their Lordships think that it is quite possible to defend that case on the ground suggested in the course of the argument, namely, that in taking care of the harbour of Ramsgate the Board of Trade, to whom that harbour with all its incidents had been transferred, was not, strictly speaking acting as a Government department, but in the character of trustees of a particular trust. But unless *The Cybele* (1) is defensible on that ground, it is not a case that their Lordships would be disposed to follow.

It is then suggested that the particular use for which the *Scotia* was to be employed—namely, as a ferry-boat to connect one part of a railway owned by the Government of Canada with another—although forming, in a general sense, part of Government administration, yet was not sufficient to vest the property in the Crown. Having regard to the various Acts of Parliament which were cited by counsel, their Lordships are satisfied that the land in question, including the railway, belonged to His Majesty. The case falls, therefore, within the general proposition that the Crown cannot be impleaded in its own Courts, and the action must fail. Their Lordships are accordingly of opinion that the judgment of the Supreme Court ought to be affirmed.

Sir Robert Reid, on behalf of the appellant, has pointed out with great force the extraordinary condition of things which

(1) 2 P. D. 224; 3 P. D. 8.

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would arise if the services which were rendered by the *Furnesia*, and which were undoubtedly of the greatest value, were not to receive their appropriate reward. No objection can properly be taken to the defence to this action. It is the duty of those who represent the Crown to place the privileges of the Crown very definitely before the Courts, and if the claim in the present case has been allowed to pass without the protest which has been made on behalf of the Crown, the case would undoubtedly have been quoted, and perhaps acted upon, in circumstances where it would not have been so appropriate to give a reward as in this instance. No observation can, therefore, be properly directed against those responsible for advising the Government to resist the present claim in the form in which it was made. The moment the vessel reached St. John's she was arrested for salvage, and, without attributing blame to anybody, it is impossible to say it was wrong either for those who had rendered services to seek to obtain salvage by the appropriate method, or for those who were advising the Crown to resist a claim which it was thought might be made a precedent. Having, however, said this much, their Lordships desire to call the attention of the Canadian Government to the condition of things which this case discloses, and to the most unfortunate results which would ensue if the refusal to compensate those who rendered the services were persisted in. Nothing could be more pitiable than the condition of the vessel as described, not by the parties themselves, but by the learned judges of the Supreme Court, who nevertheless felt compelled to adjudicate in favour of the Crown. "It must be admitted," they say, "that an ordinary steamship, not fitted with towing appliances, with another ship in tow, is at considerable risk if she is suddenly compelled to slow down on meeting an iceberg or an approaching ship, especially in such foggy weather as prevailed on the night of the 19th. Those experienced in maritime affairs will appreciate the risk to a large steamer with another large steamship in tow in mid-ocean, in the absence of those towing appliances which in tugs and other vessels specially equipped for such purposes enable the latter to manœuvre easily at all times when meeting approaching

ships or obstacles to navigation. The *Furnesia* was enabled to steam from three to seven knots, according to the weather, while she had the *Scotia* in tow, and in about twenty-seven hours reached St. John's in safety, whence, after a delay of a few hours, she proceeded on her voyage to New York. . . . We have no doubt that the services rendered by the plaintiff to the defendant were of a meritorious character and worthy of recompense upon as liberal a scale as could be awarded by this Court in the event of its being subsequently held that the plaintiff is entitled to recover against the defendant ship in this action. The *Scotia* was undoubtedly in an extremely dangerous position at the time the *Furnesia* came up with her. It was a season of the year when strong equinoctial gales usually prevail in these latitudes; she was without coal for her engines, and had only about twenty-four hours' coal for steering purposes; and had actually burnt all, or nearly all, the available woodwork about the ship, such as wooden bulwarks and the woodwork specially built at her bow and stern. (The *Scotia* is a ship built open at the bow and stern for railway ferry purposes, and but for the woodwork specially built for the voyage she would be completely unprotected from the water sweeping her 'tween decks in a heavy sea.) She would have become unmanageable when her fuel for steering purposes was exhausted. She was short of provisions, and was on the northern edge of the 'northern lane' of ocean traffic, and must have soon drifted, with the then prevailing winds, further to the north, and her chances of assistance would become therefore less and less daily. Her means of signalling passing ships were evidently very defective. Two steamers had already passed without seeing her distress signals, which can only be accounted for by the fact that she had no means by masts or poles of hoisting these signals to an altitude sufficiently high to attract passing ships distant over two miles. Altogether she seems to have been in a more helpless condition than an ordinary broken-down steamer would be in mid-ocean. The services rendered were timely, and, though not performed with extra hazardous risk to life or property, there was some considerable risk and danger—first,

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in getting the towing hawser on board by the officer and crew of the *Furnesia*, and subsequently in the performance of the work of towing. The *Furnesia* had on board a large crew, a valuable cargo, and a large number of passengers, and in addition to the risk to his ship in the performance of his undertaking there was the danger to his passengers and cargo, and the responsibility to his owners and others for the voluntary adoption of a contract (1) under such dangerous circumstances, and involving deviation and delay. These are elements, in addition to others, which must weigh with the Court in deciding upon the amount of compensation to be awarded for salvage services."

Their Lordships cannot forbear from expressing their hearty concurrence with the view of the Supreme Court as to the meritorious nature of the services rendered, and they also concur in the very cogent observation with which Sir Robert Reid concluded. He pointed out that no question can possibly be raised in this case which would entitle the policy holder to compensation. If, therefore, the refusal to make compensation is insisted on—properly enough insisted on, in the first instance, as a matter of right against the Crown—and if it comes to be thought that the Government will not feel called upon to pay compensation in any circumstances, not even in such circumstances as the present—in which their Lordships are sure that a foreign Government would feel called upon to pay compensation—what would be the result? As Sir Robert Reid most justly said, the result would be to warn everybody not to assist a ship belonging to His Majesty in however great distress she might be, and thereby incur any risk, because any claim for services would be met by the technical objection—in that respect it would be a technical objection—that no one is entitled, as a matter of right, to recover salvage from the Crown. While, therefore, on the one hand their Lordships think that it was quite right to raise the question of the Crown's privilege in this case, they would deeply lament to learn that the Canadian Government, when the circumstances are brought to their attention, refused to give effect to the

(1) *Sic* in the record.

hearty recommendation of the Court below, which their Lordships desire emphatically to indorse and to repeat.

Their Lordships will humbly advise His Majesty to dismiss the appeal. As the respondent does not ask for costs, there will be no order as to the costs of the appeal.

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Solicitors for appellant: *Botterell & Roche.*

Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

CONSOLIDATED CAR HEATING COMPANY. . . . . PLAINTIFFS;

AND

CAME . . . . . DEFENDANT.

J. C.* 1903 *June* 26, 29; *Aug.* 5.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Patent—Alleged Infringement—Coupler with Steam-tight Fasteners and Automatic Separator—New Combination of Known Features.

In an action for infringement of a patent, if the merit of the invention consists in the idea or principle which is embodied in it, and not merely in the means by which that idea or principle is carried into effect, the patentee must shew that the idea or principle is new; and must fail if the merit of his invention lies merely in a new combination of known features.

Where the appellants, patentees for improvements in hose coupling, had produced a coupler of pipes or hose attached to two railway cars, so as to secure a steam-tight fastening which would permit an automatic separation of the two ends when the cars were uncoupled; while the respondent's coupler was in all material respects the same as the appellants' and produced the same result, but omitted the use of one particular feature called a "rib" or hinge-joint, which was proved to have been a very material element in the success of the appellants' coupler, their specification shewing that they never contemplated its omission or that their invention could be operated without it:—

Held, that there had been no infringement, for the respondent's coupler was shewn to have been a different and a new way of achieving the end contemplated by the appellants' coupler.

APPEAL from a decree of the above Court (May 29, 1901) reversing a decree of the Superior Court (June 28, 1900), and

* *Present:* LORD DAVEY, LORD JAMES OF HEREFORD, LORD ROBERTSON, and SIR ARTHUR WILSON.

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dismissing the appellants' action, which had been brought in respect of the manufacture, sale, offer for sale, and importation of certain hose couplings alleged to infringe the appellants' letters patent, and especially the third claiming clause of the specification.

The appellants' invention related to means for coupling together hose for the passage of steam, water, air, &c., from one railway car to another; and the object was to construct a two-part hose coupling, each half of which should be alike and therefore interchangeable, and so arranged as to provide clear and unobstructed passage through it, and so constructed that if the ordinary coupling chains connecting the railway cars become uncoupled, the steam coupling would automatically release itself without injury.

In the application of the invention the ends of the hoses to be coupled terminate in metallic blocks provided with flat faces, which abut against each other, the blocks having passage-ways through them, which when the faces are in abutment form a continuous and unobstructed passage for the steam, &c. Each block engages with the other by means of interlocking grooves and projections, and the placing of the blocks in proper position for interlocking is facilitated by guides resembling hinge-joints.

The respondent's coupling, known as the "Gold" coupler, is substantially identical with that of the appellants, with the exceptions that the said hinge-joint guides are absent, and that a particular form of packing is used between the faces of the blocks.

The third claim of the appellants' letters patent, which was particularly alleged to be infringed by the respondent, is as follows:—

"In a two-part hose coupling, composed of like halves or portions, each of which has a free and unobstructed passage through it from end to end, which passages co-operate together to form a longitudinal unobstructed passage directly through the hose coupling, combined with locking devices as described, upon each side to lock the said halves or portions together as set forth."

The Superior Court held that the respondent had infringed;

but in appeal he contended that the hinged joints were an essential element of the third claim of the appellants' patent, being included in the words "locking devices"; and that, his own couplings having no such hinges, he had not infringed either this claim or claims 1 and 2, in which two claims the entire combination was comprised, specifically including the hinge-joint as an element.

The Appeal Court adopted this contention, and held that there had been no infringement.

Fletcher Moulton, K.C., and *Walter*, for the appellants, contended that on the true construction of claim 3 the hinge-joints were not an element of it at all. Their omission, therefore, from the respondent's coupler does not avoid infringement. Alternatively, if the hinged joints were an element of the combination, then they were, as also in claims 1 and 2, a non-essential element. The respondent had taken the essence of the patented combination, omitting an unimportant feature thereof, and had produced the same result as the appellants in substantially the same way, and therefore had infringed the letters patent in suit.

R. C. Smith, K.C., and *Frank Russell*, for the respondent, contended that the third claim in the appellants' patent on its true construction included the hinge-joints, and that no protection was afforded thereby against any structure or combination from which the hinge-joints were omitted. The evidence shewed that the hinge-joints were an essential element of the appellants' invention and constituted the substance thereof. If it were not for the hinge-joints, which constituted its essential feature, the appellants' invention was not novel or patentable. The respondent's coupler had no hinge-joint. It contained a rocking gasket at the end of each passage in the meeting faces which ensured a steam-tight joint. The difference between the two inventions is that while in the one the hinge-joint actively and positively brings the coupler heads into perfect alignment, and by that means a steam-tight joint is secured, in the other the rocking gaskets adjust themselves within the coupler heads. The coupler heads do not come into perfect alignment.

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But the meeting faces of the gaskets are always parallel to each other, and thereby make a steam-tight joint. The respondent's invention is therefore new, for it makes a steam-tight joint in an entirely new and different way from that which has been patented by the appellants. Reference was made to ss. 13 and 38 of the Canadian Patent Act (Revised Statutes, 1886), and to *Dominion Cotton Mills Co.* v. *General Engineering Co. of Ontario.* (1)

Moulton, K.C., replied.

1903
Aug. 5.

The judgment of their Lordships was delivered by

LORD DAVEY. The appellants are the assignees and proprietors of a Canadian patent (No. 26,601) dated May 4, 1887, and granted to one Sewall for improvements in hose coupling, and they sue the respondent for infringement of their patent. The respondent denies infringement, and also raises other defences. Their Lordships will first consider the issue of infringement. If that is decided in the respondent's favour, it will be unnecessary to consider the other issues.

The patented invention is chiefly used for the purpose of heating railway cars by steam. It is an extremely ingenious and, apparently, simple contrivance for uniting the ends of the pipes or hose attached to two cars so as to secure a steam-tight fastening which will, however, permit an automatic separation of the two ends when the cars are uncoupled. The patentee thus describes the nature of his invention:—

"The coupling herein to be described hangs by gravity, and is provided with locking devices which keep the two halves locked together in all positions except when turned upward at the centre."

Each half is composed preferably of a single piece of metal having a neck for the passage of the steam, &c., and a broad flat extension on one side with an inturned lip or flange, and on the other side a groove to receive the flange of the companion half. Then follows a passage on which the controversy in this case turns: "At the lower end of the meeting face of each half of the coupler a rib is provided extending half the

(1) [1902] A. C. 570.

width of said meeting face, and for the remaining distance the face is cut away to present a recess which receives the rib of the companion half to thus form, in a measure, a hinge-joint upon which the two faces of the coupler are turned to disengage them from each other." The patentee then gives a more detailed description of the parts of his contrivance by reference to the drawings, and thus describes their operation:—

"The two halves of the coupling being placed opposite to each other, as shewn in Fig. 2, it will be seen that the extension a of one-half overlaps the opposite side of the other half, the flange a^1 entering the groove b, and the rib c entering a recess formed in the opposite half corresponding with the recess c^1, while the rib formed upon said opposite half enters the recess c^1.

"It will thus be seen that the two halves are firmly locked together, and capable of being disengaged only by moving them upward on the ribs c, c, turning in the grooves c^1, c^1, which serve as a hinge-joint or connection.

"The hose or pipe to be coupled is attached to the neck A^1, and the coupling locked together hangs by gravity.

"The extension a and its flange a^1 entering the groove b^1 abut the halves together, preventing any disengagement thereof by downward or lateral movement, but permitting the said halves to be disengaged by turning them upward on the hinge-joint as above described. They will thus become disengaged themselves when the cars on which they are situated become uncoupled."

It appears, therefore, that the elements in the patentee's complete combination are (1.) the body portion with the upwardly pointing neck; (2.) the broad flat extension on one side; (3.) the flange at one edge of the broad extension; (4.) the groove on the opposite side to receive the flange; and (5.) the rib extending halfway across the lower end of the meeting face, with a corresponding recess.

There are three claims. It is agreed that by the first two claims the patentee claims in different language the entire combination. The third claim is as follows:—

"(3.) In a two-part hose coupling composed of like halves or

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portions, each of which has a free and unobstructed passage through it directly from end to end, which passages co-operate together to form a longitudinal unobstructed passage directly through the hose coupling, combined with locking devices as described, upon each side to lock the said halves or portions together as set forth."

It is scarcely disputed, and, in the opinion of their Lordships, it is established by the evidence, that the respondent's coupler (called the Gold coupler) is in all material respects the same as the appellants' with the omission of the rib and corresponding recess on the lower side of the meeting face, or (in other words) it has the elements which have been numbered (1.), (2.), (3.), and (4.), but has not that numbered (5.) or any mechanical equivalent for it. It has, however, what is called a "rocking gasket" on each orifice which (the respondent contends) compensates for any inconvenience caused by the omission of the rib. And it is argued that the respondent's coupler is a different and a new way of achieving the same end as that for which the patented combination is designed. The appellants put their case in two ways. First they say that the third claim is for the subordinate combination of (1.), (2.), (3.), and (4.). And, secondly, they say that, if that be not so, the rib and groove form an auxiliary but not an essential part of their combination, and that the respondent having taken the first four elements has taken the substance or, as it is sometimes called, the "pith and marrow" of their combination, and has therefore infringed their patent. The respondent denies both these propositions. Pagnuelo J. decided both questions in favour of the appellants. The Court of King's Bench on appeal, by an unanimous judgment delivered by the learned Chief Justice, decided both questions in favour of the respondent, and by their judgment of May 29, 1901, allowed the appeal and dismissed the action with costs.

On the question of construction the argument was narrowed to the question whether the expression "locking devices as described" in the third claim includes the rib and corresponding groove. In order to answer this question one must consider what part this element of the combination bears in

the operation. The only passage in the specification in which the expression "locking devices" is used is in the paragraph containing a general description of the nature of the invention which is expanded in the three following paragraphs already quoted. The patentee there speaks of "locking devices which keep the two halves locked together," and does not mention either the rib or any other details. This paragraph, containing only a general description, does not appear to their Lordships to afford them any assistance. In his description of the rib the patentee speaks of it as forming "in a measure" a hinge-joint on which the two faces of the coupler are turned to disengage them from each other. This describes one office of the rib, but does not exclude other uses of it. When the mode of operation is described the patentee, after shewing how the flange a^1 enters the groove b and the rib c enters the corresponding groove on the opposite half, adds, "it will thus be seen that the two halves are firmly locked together." Their Lordships think that, according to any fair interpretation of this language, the rib c is in this passage described as bearing a part in the process of engaging the two halves and causing them to be firmly locked together, as well as in the disengaging of the two halves. The evidence of the working of the invention confirms this view. It is shewn by witnesses of the appellants as well as those of the respondent that the ribs (1.) act as a guide to the workman engaged in coupling or locking the two parts together, and (2.) bring, and afterwards retain, the coupler heads in perfect alignment so as both to make and keep a steam-tight joint, and also to prevent the parts jamming, and thereby to facilitate the disengagement. Without reading it their Lordships refer to McElroy's evidence, Gallagher's, and Fraser's.

Their Lordships think it would be too narrow a construction to put on the words "locking devices as described" to confine them to the actual clamping or engaging parts, and that, according to any fair interpretation, they should be held to include everything described in the specification which aids and facilitates the process of locking and the retention of the parts when locked in a proper working position. The Canadian

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Patent Act (c. 61 of the Revised Statutes of 1886) requires (s. 13) the patentee "to state clearly and distinctly the contrivances and things which he claims as new, and for the use of which he claims an exclusive property and privilege." There is not the slightest indication to be found in the body of the specification that in the contemplation of the inventor the ribs and corresponding grooves could be dispensed with in operating the invention, and their Lordships cannot hold that there is any clear and distinct claim to the subordinate combination. In the present case there is no room for the argument that something different must be intended to be claimed in the third claim, because admittedly the first and second claims are both for the entire combination.

The second point made by the appellants, namely, that the respondent has taken the substance of the invention, involves considerations of some nicety and great difficulty. Their Lordships cannot adopt the view apparently taken by the learned Chief Justice that the matter is to be determined simply on reading the specification. They think that, according to established authority, the Court is bound to decide as a fact whether the alleged infringer has taken the substance of the invention, and in forming an opinion on that question to have regard to the evidence as to the existing state of knowledge on the subject at the date of the patent and as to the operation of the machine. The law on the subject was stated by Lord Cairns in the House of Lords in *Clark* v. *Adie* (1), and subsequent cases are only useful as illustrating and expanding what was there said. His Lordship, after describing the apparatus there in question, which was one for an improved horse-clipper, said there were three ways in which such an apparatus might be infringed. First, the infringer might take the whole instrument from beginning to end, in which case no question could arise. Secondly, the infringer might not take the whole instrument, but he might take a certain number of parts of the instrument described, "and there the question would be, either for a jury or for any tribunal which was judging of the facts of the case, whether that which was done

(1) (1877) 2 App. Cas. 315, at pp. 320, 321.

by the alleged infringer amounted to a colourable departure from the instrument patented, and whether in what he had done he had not really taken and adopted the substance of the instrument patented; and it might well be, that if the instrument patented consisted of twelve different steps, producing in the result the improved clipper, an infringer who took eight or nine or ten of those steps might be held by the tribunal judging of the patent to have taken, in substance, the pith and marrow of the invention, although there were one, two, three, four or five steps which he might not actually have taken and represented upon his machine."

The third way in which an apparatus might be infringed (said Lord Cairns) was the case which their Lordships have already discussed, where the patentee claims a part or parts of his larger combination as a separate head of invention. But then, he said, the invention must be described in that way, and it must be made plain to ordinary apprehension upon the ordinary rules of construction that the patentee had in his mind and intended to claim protection for those subordinate integers.

In *Proctor* v. *Bennis* (1) Cotton L.J. said: "In my opinion omissions and additions may be very material in considering whether, in fact, the machine of the defendant is an infringement of the combination which the plaintiff claims; but if the defendant really has taken the substance and essence of the plaintiff's combination, the mere fact that certain parts are omitted or certain parts added cannot prevent his machine from being an infringement of the plaintiff's patent."

Not to multiply quotations, their Lordships will only cite further what was said by a very learned judge in Scotland, where the patent law is the same as in this country. In *Gwynne* v. *Drysdale* (2) Lord President Inglis said: "I am not . . . . to be understood as saying that an infringer, by merely omitting some immaterial part of the mechanism described in the specification, or substituting for such immaterial part some mechanical equivalent, will escape conviction if his machine contains all the essential and characteristic

(1) (1887) 36 Ch. D. 740, at p. 756. (2) (1886) 3 Rep. Pat. Cas. 65.

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features of the patented combination. But if in the machine of an alleged infringer any material part of the patented combination is omitted, then the combination used by the alleged infringer is a different combination from that of the patentee. The omission of one material part may be an improvement or the reverse. The possibility of dispensing with it may be a valuable discovery, or the omission may be made merely for the purpose of avoiding an infringement, but in either case the combination of the patentee minus an essential part of it is no longer his combination."

Their Lordships think it is not necessary for the respondent to shew that the omitted part was an essential element of the combination in the sense that the machine would not work without it. But it must be a material element and not a mere detail in the complete machine, which may be varied or omitted altogether without serious detriment to the successful working of it. Mr. Moulton, in the course of his argument, produced the two halves of a Sewall coupler from which the ribs had been filed or sawn away. And he shewed by ocular demonstration that the two halves without the rib would lock and remain locked by gravity, and when turned upwards automatically disengage. It was not denied on behalf of the respondent that this was so experimentally, but it was said that in practice the Sewall coupler could not be relied on to work successfully without the rib.

Their Lordships think that this contention is borne out by the evidence. Mr. McElroy, the consulting engineer of the appellants, who gave his evidence with great candour and fairness, after shewing to the Court the same experiment as was shewn to their Lordships, says: "I desire to say that in all of those constructions of couplers in which the hinge-joint is omitted there is liable to be, and will be perhaps one time in twenty or once in fifty, a failure in separating automatically, that failure being due to the fact that the inturned lips on the two couplers forming the combination will not leave the grooves at the same time, and one is therefore liable to hook into the groove on the opposite coupler, and may possibly, one time in fifty, as I have already stated, fail to disconnect."

Evidence was also given, on behalf of the defendant, that the safety coupler (which operated in the same way as the Sewall coupler without the rib) was used on the Illinois Central Railroad for about two years, and abandoned for the Sewall coupler, and that the same coupler was used for a year and a half on the Northern Pacific Railroad and abandoned for the Gold coupler. The respondent, as already mentioned, contends that the device of "a rocking gasket" in the Gold coupler compensates in a large measure for the want of the rib by securing a steam-tight joint and preventing the friction and consequent wear and tear of the gaskets. The evidence of Mr. Gold (not the inventor of the Gold coupler) contains the following passage. Asked whether the Safety coupler and the Martin coupler were commercially successful, he says: "No, not exactly. The trouble with the couplers was that they had a fixed gasket and could not move, and they had no hinge to always bring them straight together, and no hinge to always break them evenly, and the result was that it did not work well. It was not what we would call a commercial success." This answer, so far as relates to the use of the "hinge" or rib, confirms the statements in the appellants' catalogues which were put to Mr. McElroy in cross-examination and adopted by him. Their Lordships have not to say whether Gold's "rocking gasket" and certain minor alterations made by him in the shape of the flanges (which are immaterial for the present purpose) adequately compensate for the omission of the rib, although, judging from the use of the couplers on the Northern Pacific and other railroads in the United States (Gold's evidence) it would appear to be so in some measure at least. But they come to the conclusion that the hinge or rib was a material element in the appellant's combination, and the use of it materially contributed, if it was not essential, to the commercial success of their coupler.

In determining the question whether the substance of the invention is taken, it is important to consider the position of the patent with reference to the previous knowledge on the subject. For if the merit of the invention consists in the idea or principle which is embodied in it, and not merely in the

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means by which that idea or principle is carried into effect, a machine which is based on the same idea or principle may still be an infringement, although the detailed means adopted for carrying it into effect may be somewhat different. Their Lordships on this point adopt the following statement of the appellants in their factum in the Court of King's Bench, which their Lordships think is borne out by the evidence. "The plaintiff," they say, "has not claimed that its patent is a pioneer patent. Gravity couplers were old; straight port couplers of automatic disengagement were old; but it has been shewn that Sewall was the first to combine successfully all these features in a coupler capable of maintaining a steam-tight joint against internal pressure. It was the first coupler that really met the needs of the railway world." Giving Sewall full credit for having solved a problem which his predecessors had failed to solve, he cannot be said to have embodied any new idea or principle in his invention. The merit of it lies in the new combination of known features, and the fact remains that the use of the rib was a very material element in the commercial success of Sewall's solution of the problem. It is not proved that his coupler would have achieved that success without it, or that he ever contemplated the omission of it in operating his invention.

Their Lordships, therefore, have come to the conclusion that the appellants have failed to prove that the respondent has infringed their patent, and they will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of it.

Solicitors for appellants: *Faithfull & Owen.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

CLERGUE AND ANOTHER . . . . . PLAINTIFFS; J. C.* 1903 July 21.

AND

MURRAY AND ANOTHER . . . . . DEFENDANTS.

Ex parte CLERGUE.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Practice—Special Leave—Revised Statutes of Canada, 1886, *c.* 135, *s.* 71.

According to s. 71 of Revised Statutes of Canada, 1886, c. 135, there is no appeal from any judgment or order of the Supreme Court of Canada except by special leave of His Majesty in Council.

Where a suitor, having his choice whether to appeal to the Supreme Court or to His Majesty in Council, elects the former remedy, it is not the practice to give him special leave except in a very strong case.

Prince v. *Gagnon*, (1882) 8 App. Cas. 103, followed.

THIS was a petition for special leave to appeal to His Majesty in Council from a decree of the Supreme Court dated May 27, 1902, by the above plaintiffs, who had exercised the option of appealing to the said Court and had failed therein. It was made on the ground that the questions involved were of public importance.

Riddell, K.C., and *Maclaren*, for the petitioners.

The judgment of their Lordships was delivered by

LORD DAVEY. The petitioners in this case brought an action in the High Court of Justice for Ontario for specific performance of an alleged contract. The High Court held that there was no contract in fact, and that, if there was a contract, there was no memorandum in writing to satisfy the Statute of Frauds. The petitioners then appealed to the Court of Appeal for Ontario, which Court confirmed the decision of the High Court. The petitioners were still dissatisfied. They had now two courses open to them. They might appeal either to His Majesty in Council, or to the Supreme Court of Canada.

* *Present:* LORD DAVEY, LORD JAMES OF HEREFORD, LORD ROBERTSON, and SIR ARTHUR WILSON.

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They elected to appeal to the Supreme Court of Canada, and the Supreme Court took the same view that had been taken in the Court of Appeal for Ontario and dismissed the appeal. They now come to this Board, and ask this Board to advise His Majesty to give special leave to appeal from the judgment of the Supreme Court of Canada.

According to c. 135 of the Revised Statutes of Canada, 1886, s. 71, there is no appeal from any judgment or order of the Supreme Court of Canada (which is, as its name imports, the Supreme Court of the Dominion) except by special leave of His Majesty in Council.

The principles upon which this Board will advise His Majesty to grant special leave to appeal from the Supreme Court of Canada have been laid down over and over again. Their Lordships repeat these principles now, because it appears from this case, as from other cases, that Canadian counsel do not always observe them. In the case of *Prince* v. *Gagnon* (1) this Board said: "Before the constitution of the Supreme Court of the Dominion of Canada there was a right to appeal from the Courts then in existence where the value of the matter in controversy was beyond 500*l.*, but that does not apply to the Supreme Court. The language of the Legislature of the Dominion is (2): 'The judgment of the Supreme Court shall in all cases be final and conclusive . . . . saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative'; and their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character." Accordingly their Lordships did not advise Her Majesty to allow an appeal in that case.

Those principles have been consistently acted on by this Board. And in the case of *Consumers' Cordage Co., Ld.* v. *Connolly* (which was a petition for special leave to appeal

(1) 8 App. Cas. 103. (2) Revised Statutes of Canada, 1886, c. 135, s. 71.

from a judgment of the Supreme Court of Canada, heard by this Committee on June 27, 1901), it was said that where a person has elected to go to the Supreme Court, it is not the practice to allow him to come to this Board, except in a very strong case. It is different where a man is taken before the Supreme Court, because he cannot help it. But where a man elects to go to the Supreme Court, having his choice whether he will go there or not, this Board will not give him assistance except under special circumstances.

Their Lordships think that Canadian counsel ought to consider these principles before bringing a case like the present before them. It would be nothing less than a miscarriage of justice if their Lordships were to impose on the respondents (the defendants in the action) a fourth hearing of the case, with all the expenses attendant upon an appeal to His Majesty in Council, after there have been three decisions in the Canadian Courts, the final decision being that of the Supreme Court of the Dominion, which is entitled to every confidence on the part of the Canadian people.

In the opinion of their Lordships this petition is one which ought never to have been presented, and they will humbly advise His Majesty that it ought to be dismissed.

Solicitors for the petitioners: *Linklater & Co.*

NOTE.—It may be added that in two cases of nearly the same date as the above their Lordships advised His Majesty to grant special leave to appeal from the Supreme Court of Canada to petitioners who had carried an appeal to the Supreme Court.

In one case (*Calgary and Edmonton Ry. Co. and Another* v. *Rex*, heard by the Judicial Committee on July 16, 1903) the petitioners' appeal to the Supreme Court was only dismissed by reason of an equal division of opinion among the four learned judges constituting the Court, and the question affected the rights of the Crown in respect of minerals over lands of very large extent.

In the other case (*Hamburg-American Steam Packet Co. and Others* v. *Rex*, heard by the Judicial Committee on July 22, 1903) the question of law involved affected certain general liabilities of the Crown, and was therefore, in their Lordships' opinion, of great importance quite apart from the facts of the particular case.

In both cases, however, the appeal lay by statute, s. 51 Supreme and Exchequer Courts Act, 1887, in the first place to the Supreme Court.

[PRIVY COUNCIL.]

J. C.* 1893 July 9, 10, 14.

ATTORNEY-GENERAL FOR ONTARIO Appellant;

AND

THE HAMILTON STREET RAILWAY COMPANY AND OTHERS . . . . . } Respondents.

APPEALS AND CROSS-APPEALS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Powers of Local Legislature—Ontario Act to prevent the Profanation of the Lord's Day ultra vires — Exclusive Power of the Dominion Parliament over Criminal Legislation—British North America Act, 1867, *s.* 91, *sub-s.* 27—*Practice as to Questions referred.*

Held, that "An Act to prevent the Profanation of the Lord's Day" (Revised Statutes of Ontario, 1897, c. 246) treated as a whole is ultra vires of the Ontario Legislature.

The criminal law in its widest sense is reserved by s. 91, sub-s. 27, of the British North America Act, 1867, for the exclusive authority of the Dominion Parliament; and an infraction of the above Act is an offence against criminal law.

It is not the practice of their Lordships to give speculative opinions on hypothetical questions submitted. The questions must arise in concrete cases and involve private rights.

Appeal from a judgment of the Court of Appeal (April 14, 1902) in respect of the answers to all the following questions except the first referred to that Court by the Lieutenant-Governor of Ontario, namely:—

1. Had the Legislature of Ontario jurisdiction to enact c. 246 of the Revised Statutes of Ontario, 1897, intituled "An Act to prevent the Profanation of the Lord's Day," and in particular ss. 1, 7, and 8 thereof?

2. (A) Had or has the Legislature of Ontario power by the aforesaid Act, or any Act of a similar character, to prohibit the doing or exercising of any worldly labour, business, or work on the Lord's Day within the province upon and in connection with the operation of lines of steam or other ships, railways,

* *Present:* The Lord Chancellor, Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson, and Lord Lindley.

canals, telegraphs, and other works and undertakings to which the exclusive legislative authority of the Parliament of Canada extends under the British North America Act, s. 21, sub-s. 29, and s. 92, sub-s. 10, A, B, C?

(B) Had or has the Legislature of Ontario power to prohibit the doing or exercising of any worldly labour, business, or work on the Lord's Day within the province, when such prohibition would affect any matter to which the exclusive legislative authority of the Parliament of Canada extends under any other sub-section of said s. 91, as, for example, sub-ss. 5, 10, and 13?

3. In s. 1 of said statute, Revised Statutes of Ontario, c. 246, or the Consolidated Statute of Upper Canada, c. 104, as the case may be, do the words "other person whatsoever" include all classes of persons other than those enumerated who may do any act prohibited by said section, or is the meaning of these words limited so as to apply only to persons ejusdem generis with the classes enumerated?

4. Subject to the exceptions therein expressed, does said s. 1 prohibit individuals who for or on behalf of corporations do the labour and work or exercise the business of carrying passengers for hire from doing such labour and work and exercising such business on the Lord's Day, whether the corporations for or on behalf of which the work or labour is done are or are not within the prohibition of the said section?

5. Do the words "conveying travellers," as used in said s. 1, apply exclusively to the carrying to or towards their destination of persons who are in the course of a journey at the commencement of the Lord's Day?

6. Does the said s. 1 apply to and include corporations?

7. (A) Do the words "work of necessity," as used in said s. 1, apply so as to include the doing of that which is necessary for the care or preservation of property so as to prevent irreparable damage other than mere loss of time for the period during which the prohibition extends?

(B) If so, is the necessity contemplated by the statute only that which arises from the exigency of particular and occasional circumstances, or may such necessity grow out of or be incident to a particular manufacture, trade, or calling?

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(c) If such necessity may grow out of or be incident to a particular manufacture, trade or calling, do the words "work of necessity" apply exclusively to the doing on the Lord's Day of that without which the particular manufacture, trade, or calling cannot successfully be carried on during the remaining six days of the week?

The respondents to the appeal were the Hamilton Street Railway Company, the Metropolitan Railway Company, the Grand Trunk Railway Company of Canada, the Niagara Navigation Company, the Willson Carbicle Company of St. Catherine's, Limited, Walter Barwick, the Ontario Lord's Day Alliance, and the Attorney-General for the Dominion. Several of the respondents cross-appealed as to the answer to the first question.

The Court of Appeal answered the first question in the affirmative, the second in the negative. As regards the third question, the answer to its first branch was negative and to its second affirmative. The fourth, fifth, and sixth questions were answered in the negative. 7 (A), 7 (B), and 7 (C) were not answered.

The judgment of their Lordships overruled the answer of the Court to the first question.

Paterson, K.C., for the appellant, contended that the first question was rightly answered in the affirmative; and that the second should also have been answered in the affirmative. The provincial legislatures had since confederation assumed to legislate as to Sunday observance, while the Dominion never attempted to do so and never disputed the provincial right. The Act in question is a dealing with property and civil rights under s. 92, sub-s. 13, of the British North America Act of 1867. It did so by preventing work on Sundays. It came within matters of a local or private nature under s. 92, sub-s. 16. It had no relation to religion or to criminal law. A crime is an indictable offence; fine or imprisonment being attached to a provincial law did not make it a criminal enactment. The Act is not applicable to the whole community. As to question No. 2, the prohibitions referred to come within s. 92,

sub-ss. 13 and 16. Reference was made to *City of Fredericton* v. *Reg.* (1)

A. E. O'Meara, for the Lord's Day Alliance, contended that the subject of the Act in question was a matter of civil right and not of criminal law. That disobedience to a statute is not always indictable, see *Reg.* v. *Buchanan* (2); *Reg.* v. *Hall.* (3) As to civil rights, see *Jones* v. *Stanstead Ry. Co.* (4); *Cushing* v. *Dupuy* (5); *Tennant* v. *Union Bank of Canada* (6); *Attorney-General for Ontario* v. *Attorney-General for Canada* (7); *Citizens' Insurance Co.* v. *Parsons* (8); *Bank of Toronto* v. *Lambe* (9); *Phillips* v. *Innes* (10); *Reg.* v. *Wason* (11); *Union Colliery Co.* v. *Bryden.* (12)

Aylsworth, K.C., for Walter Barwick and others, who filed a joint case, contended that the answer of the Court to the first question should have been in the negative in accordance with the opinion to that effect of the Chief Justice. The Act in question was originally enacted by the Parliament of the late province of Canada before 1867, which was competent for the purpose. So far as it has been unaltered it is applicable to the province of Ontario. Its re-enactment by the local legislature was superfluous. And at least the modifications introduced by ss. 1, 7, and 8 referred to in the question are ultra vires. The answer to the first question turns upon whether the local Act enacts a criminal law within the meaning of s. 91, sub-s. 27, of the Act of 1867. One test is whether the Act was passed to punish an offence in the interest of public morality or to regulate civil rights between individuals. Another is whether it deals with a matter which at common law or by statute fell within criminal jurisdiction. The profanation of the Lord's Day was an indictable offence at common law; a form of indictment against a Sabbath-breaker in keeping open shop is given in 2 Chitty's Criminal

(1) (1880) 3 Sup. Ct. Rep. 532.
(2) (1846) 8 Q. B. 883.
(3) [1891] 1 Q. B. 747.
(4) (1872) L. R. 4 P. C. 98, 116.
(5) (1880) 5 App. Cas. 409.
(6) [1894] A. C. 31.
(7) [1896] A. C. 348.
(8) (1881) 7 App. Cas. 96.
(9) (1887) 12 App. Cas. 575, 581.
(10) (1837) 4 Cl. & F. 234, 240 42 R. R. 19.
(11) (1890) 4 Cartwright, 578, 614; S.C. 17 Ont. App. Rep. 221.
(12) [1899] A. C. 580.

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Law, 2nd ed. p. 20. The Act is based on the ground that it is immoral and against peace and good order to profane the Sabbath. Prior to confederation the provincial Lord's Day Act was part of the criminal law of Nova Scotia. And the subject of Sunday observance had before confederation been embodied in the criminal law of Upper Canada by a competent legislature: see Con. St. Upper Canada, c. 104. The primary object of the Act under consideration was the promotion of public order, safety and morals, and not the regulation of civil rights as between subject and subject. Reference was made to *Reg.* v. *Wason* (1); *Reg.* v. *Lawrence* (2); *Reg.* v. *Boardman* (3); *Fisheries' Case.* (4)

Newcombe, *K.C.*, and *Loehnis*, for the Dominion of Canada.

Osler, *K.C.*, and *L. L. Batten*, for the Grand Trunk Railway.

The Hamilton Street Railway did not appear.

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The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that the Act in question, Revised Statutes of Ontario, 1897, c. 246, intituled "An Act to prevent the Profanation of the Lord's Day," treated as a whole was beyond the competency of the Ontario Legislature to enact, and they are accordingly of opinion that the first question which was referred to the Court of Appeal for Ontario by the Lieutenant-Governor, pursuant to c. 84 of the Revised Statutes of Ontario, 1897, ought to be answered in the negative.

The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Sect. 91, sub-s. 27, of the British North America Act, 1867,

(1) 4 Cartwright, 578.
(2) (1878) 1 Cartwright, 742; S.C. 43 U. C. Q. B. 164.
(3) (1871) 1 Cartwright, 676; S.C. 30 U. C. Q. B. 553.
(4) [1898] A. C. 700.

reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of Courts of criminal jurisdiction." It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, "the constitution of Courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament.

Their Lordships' opinion on the first question renders it unnecessary to answer the second.

With regard to the remaining questions, which it has been suggested should be reserved for further argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it.

Their Lordships will, therefore, humbly advise His Majesty that the first question ought to be answered in the negative, and that no answers ought to be given to the questions 3 to 7

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inclusive. There will be no order as to the costs of these appeals.

Solicitors for appellant: *Blake & Redden.*

Solicitors for Ontario Lord's Day Alliance: *Fox & Reece.*

Solicitors for Barwick, Metropolitan Railway, and another: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for Attorney-General for the Dominion: *Charles Russell & Co.*

Solicitors for Grand Trunk Railway: *Batten, Proffitt & Scott.*

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1903, will be as follows :—

In the First Series,
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In the Second Series,
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Bankers are protected by s. 82 of the Bills of Exchange Act, 1882, only where they receive payment of a crossed cheque as agents for collection for a customer. They are not so protected when they receive payment as holders of the cheque on their own account.

The appellant banks credited a customer with the amounts of cheques as soon as they were handed in to his account and allowed him to draw against the amounts so credited before the cheques were cleared:—

Held, that they were not protected by s. 82.

The protection given by s. 82 applies only to cheques crossed before they are received by the banker.

The decision of the Court of Appeal, [1902] 1 K. B. 242, affirmed on the above points.

A banker's draft payable to order on demand addressed by one branch of a bank to another branch of the same bank and not crossed is not a cheque within the meaning of ss. 60, 82 of the Bills of Exchange Act, 1882, nor is it within s. 17 of the Revenue Act, 1883. But it is within s. 19 of the Stamp Act, 1853, which protects bankers bonâ fide paying such drafts to holders claiming under forged indorsements.

The decision of the Court of Appeal varied to the above effect on this point. CAPITAL AND COUNTIES BANK, LIMITED *v.* GORDON. LONDON CITY AND MIDLAND BANK, LIMITED *v.* GORDON
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Although an infant may be a member of a building society registered under the Building Societies Act, 1874, and may by s. 38 "give all necessary acquittances," he cannot execute a valid mortgage to secure advances made to him by the society. Such a mortgage is by the Infants Relief Act, 1874, s. 1, absolutely void as against the infant.

The decision of the Court of Appeal, [1902] 1 Ch. 1, affirmed. NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY *v.* THURSTAN
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—— *Tuck & Sons* v. *Priester*, (1887) 10 Q. B. D. 620.
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CLUB—*Principle upon which Clubs are founded—Liability of Trustees of Club in respect of Leases—Liability of the Members of a Club—Appeal from New South Wales.*

The rule that trustees are entitled to be indemnified by their cestuis que trustent against liabilities incurred by their holding trust property does not apply to cases where the nature of the transaction excludes it.

An ordinary club is formed upon the tacit understanding, judicially recognised, that no member as such becomes liable to pay to its funds or otherwise any money beyond the subscriptions required by its rules.

Trustees of a club who have incurred liability under onerous covenants contained in a lease, accepted by them on its behalf, are entitled to indemnity out of any property of the club to which their lien as trustees extends. Its members are not, by reason only of being cestuis que trustent, personally liable to indemnify them, where there is no rule imposing such liability upon them. WISE *v.* PERPETUAL TRUSTEE COMPANY - - - - - **P. C. 139**

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CONTRACT—*Assignability—Contract to supply Goods to Company—Assignment of Contract—Liquidation of Company—Rights of Contracting Company and Assignee—Joinder of Assignor in Action.*

The appellant, owner of chalk quarries, made a contract with the Imperial Portland Cement Company, Limited, by which it was agreed that he would for fifty years supply to the company and that the company should take and buy from him at least 750 tons of chalk per week at a certain price, and so much more (if any) as the company should require for the whole of their manufacture of Portland cement upon their land near the quarries. The Imperial Company afterwards assigned the contract and sold its undertaking, land, works, and business to the Associated Company, Limited, and went into voluntary liquidation, its affairs being wound up and its assets distributed:—

Held (by Lords Macnaghten, Shand, and Lindley, the Earl of Halsbury L.C. doubting and Lord Robertson dissenting), that upon the true construction of the contract it must be read as if it had been expressed to be made with the Imperial Company, its successors and assigns, owners and occupiers of the works; that the Associated Company was entitled to the benefit of the contract, and could enforce it by action without joining the Imperial Company as plaintiffs.

The decision of the Court of Appeal, [1902] 2 K. B. 660, affirmed, except on the question of

CONTRACT—*continued.*
joining the Imperial Company. TOLHURST *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED. TOLHURST *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LIMITED, AND IMPERIAL PORTLAND CEMENT COMPANY, LIMITED - - - - H. L. (E.) 414

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DIVORCE—*Marriage Contract—Effect of Divorce on Children's Provisions—Income undisposed of —Scottish Act*, 1573, *c.* 55.

By ante-nuptial contract of marriage the intended wife conveyed a sum of about 19,000*l.* to trustees, directing them to pay the annual income to her during her life, and after her death, in the event of her being survived by her husband, to pay the same to him during all the days of his life and survivance, and on the death of the said spouses to pay or deliver the fee or capital of the said means and estate to the child or children of the marriage.

The marriage was dissolved by decree of divorce obtained by the wife against the husband on the ground of desertion. Thereafter the wife died survived by her husband and a daughter. The daughter and her marriage contract trustees claimed that in consequence of the wife's death and the husband being divorced she (the daughter) and her trustees became entitled to the funds in the hands of her mother's marriage trustees:—

Held, affirming the decision of the Second Division of the Court of Session, (1901) 4 F. 278:

DIVORCE—*continued.*
(1) That the divorce of the father was not equivalent to his death in a question as to the vesting of the daughter's provision; (2) that during her father's life nothing fell to the daughter; and (3) that the income which but for the divorce would have been paid to the father fell into the executory estate of the wife. DAWSON *v.* SMART - - - - H. L. (Sc.) 457

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EMPLOYER AND WORKMAN—*Compensation—"By Accident," Injury—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.
In the Workmen's Compensation Act, 1897, the word "accident" is used in the popular and ordinary sense, and means a mishap or untoward event not expected or designed.
A workman, employed to turn the wheel of a machine, by an act of over-exertion ruptured himself:—
Held, that he suffered an "injury by accident" within the meaning of the Act and was entitled to compensation.
Hensey v. *White*, [1900] 1 Q. B. 481, overruled. FENTON *v.* THORLEY & CO. - H. L. (E.) 443

2. —— *Compensation—"Earnings"—Deductions from Wages—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), 1*st Sched.* (1), (*a*).
In estimating the compensation payable to an injured workman under the Workmen's Compensation Act, 1897, the word "earnings" in the Act means the sum the workman receives for his labour when he comes to it properly equipped according to the general understanding and practice in the particular trade.
From the weekly wages of a collier his employers deducted by agreement sums for cleaning lamps, supply of oil, sharpening picks, and checking weights:—
Held, that his "earnings" under the Act for the purpose of estimating compensation for injury were his full wages without the deductions.
The decision of the Court of Appeal in *Houghton* v. *Sutton Heath and Lea Green Collieries Co.*, [1901] 1 K. B. 93, approved. ABRAM COAL COMPANY *v.* SOUTHERN - - H. L. (E.) 306

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—— Power of attorney—Implied warranty of authority—Forged power - - 114
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FORMÂ PAUPERIS—Petition for leave to appeal in—Application must be first made to Court below - - - - 170
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GRANT—Lost—Way — Prescription — Inference from facts—Payment for user - 229
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HIGHWAY—Tramway, Obligation to keep surface of, in good condition—Liability in damages to individual - - 99
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HOUSE OF LORDS — Practice as to questions referred—Appeal from Ontario - 524
See PRIVY COUNCIL APPEALS. 7.

HUSBAND AND WIFE—Divorce—Effect of, on children's provisions — Income undisposed of - - - - 457
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—— Statements by as to paternity—Access or non-access before marriage - 395
See LEGITIMACY.

INCOME TAX — Annuity — Purchase-money — Payment by annual instalments with interest - - - - 299
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INCOME TAX—*continued.*

—— Colonial investments, Interest from—Remittances not identified as capital 129
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INFANT—Building society—Mortgage by infant member invalid—Lien of building society - - - - 6
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—— Divorce, Effect of, on children's provisions—Income undisposed of - - 457
See Divorce.

INFRINGEMENT—Patent—Alleged infringement—Coupler—New combination of known features—Appeal from Quebec
See Privy Council Appeals. 14. 509

INN—Licensing Acts.
See under Licensing Acts.

INSOLVENCY—Debtor—Cause of action - 213
See Privy Council Appeals. 9.

INTERNATIONAL LAW—Copyright within the United Kingdom—Appeal from Ontario
See Privy Council Appeals. 5. 496

INVESTMENT—Change of—Settled land—"Capital money"—Premiums—Ademption - - - - - 13
See Power of Appointment. 2.

IRISH LAW—Poor-rate collector (Ireland)—Remuneration—Transfer of existing officers to county council - - - 402
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ISSUE—"Issue"—Shelley's Case, Rule in—Estate in special tail - - 111
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—— Will—Construction—Gift over—Appeal from Tasmania - - - 379
See Privy Council Appeals. 26.

JOINDER—Practice—Joinder of assignor in action—Contract to supply goods to company
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JURISDICTION—Arbitrators—Award—Deed of submission—Construction - - 39
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LANDLORD AND TENANT—Liability of lessee to adjoining proprietor in respect of works on his land—Damages—Law of Lower Canada - - - - 85
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LANDS—Claim to take, for railway purposes—Compensation—Cape of Good Hope Act
See Privy Council Appeals. 16. 355

—— Non-renewal of licences gazetted by mistake—New South Wales Crown Lands Act - - - - - 365
See Privy Council Appeals. 23.

LANDS CLAUSES ACTS—*Railway—Reservation of Minerals—Conveyance of Surface—Costs—Lands Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 19), *ss.* 117, 119.

The appellants purchased the rights of a feuar, in whose feu contract the minerals were reserved by the superior, the respondents' predecessor. In 1892 a controversy arose between

LANDS CLAUSES ACTS—*continued.*

the appellants and the respondents as to the position of the appellants in respect to their dealings with minerals both above and below the authorized formation of level of the appellants' line. In 1894 the Court of Session decided that the respondents were entitled to the minerals below the authorized formation, and reserved to the respondents any claim they might have for the value of the minerals in the said lands above the authorized level of the railway, to be determined by arbitration in terms of the Lands Clauses Consolidation (Scotland) Act, 1845, s. 117. In 1896 the respondents applied for compensation for the minerals above the surface. The appellants denied that they were under any liability for compensation, claiming to have purchased the minerals in their conveyance from the feuar of the surface, and that it was within their right to remove them. The respondents then commenced this action, contending that the appellants stood now to be treated as trespassers, it being too late for them to rely on s. 117 of the Act of 1845, they not having lodged a notice to treat within six months from the decision in 1894. The appellants contended that if they were wrong in their claim of ownership, they were still entitled to pay for the minerals by way of compensation, and not by damages, the six months given by the said Act not yet having commenced to run, as they had all along disputed the respondents' right:—

Held, reversing the decision of the Court of Session, (1899) 37 S. L. R. 150, 406, that there had been no final determination, within the language of the section, of the respondents' right, and that, although this House now held their claim good, yet the appellants were not trespassers, and were entitled to the minerals upon payment of compensation:

Held, also, that the claimants (the respondents) were the proper parties to initiate a claim which it would have been possible for the appellants to satisfy. Caledonian Railway Company *v.* Davidson - - - H. L. (Sc.) 22

—— Minerals—Repeal of prior Act—Reservation of vested rights - - - 289
See Railway.

—— Waterworks—Notice to prevent working of mines—Compensation—Rise in value of minerals—Evidence - - 426
See Mines.

LEASE—Club, Liability of trustees of, in respect of leases - - - - 139
See Club.

LEGITIMACY—*Paternity of Child born in Wedlock—Evidence—Husband and Wife, Statements by as to Paternity—Access or Non-access before Marriage.*

Less than six months after the late Earl Poulett's first marriage a son was born, a full-grown child. In a suit to perpetuate testimony, Earl Poulett deposed that he had never had sexual intercourse with his wife before the marriage; that soon after the marriage she confessed to him that she was at the time of the marriage enceinte by another man, the father of the child; that he then separated from his wife for ever and

LEGITIMACY—*continued.*
never acknowledged the child as his. Upon the question of the legitimacy of the child in a claim to the peerage :—

Held, that the deposition of Earl Poulett was admissible as evidence that the child was a bastard.

Anon. v. *Anon.*, (1856) 22 Beav. 481 ; 23 Beav. 273, overruled. THE POULETT PEERAGE. (COMMITTEE FOR PRIVILEGES.) - H. L. (E.) 395

LICENSING ACTS—*Renewal—Beerhouse—Value of Premises — Disqualification — Break in Continuity of Licence—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 45.

To justify an objection to the renewal of a beerhouse licence on the ground that the premises are not of the annual value required by s. 45 of the Licensing Act, 1872, it must be shewn that the premises were not at the date of the passing of that Act licensed for the sale of intoxicating liquors for consumption thereon. The fact that there was a break in the continuity of the licence between that date and the application for the renewal is immaterial.

The decision of the Court of Appeal, [1902] 2 K. B. 467, reversed, and the decision of the King's Bench Division, [1901] 2 K. B. 740, restored. IGOE *v.* SHANN - H. L. (E.) 320

LIEN—Building society — Mortgage by infant member invalid - - - 6
See BUILDING SOCIETY.

LIGHT AND AIR—Electric light.
See under ELECTRIC LIGHT.

LIQUIDATOR—Restricted power of liquidators of bank to sue in their own names - 220
See PRIVY COUNCIL APPEALS. 10.

LOCAL GOVERNMENT — Poor-rate collector (Ireland)—Remuneration — Transfer of existing officers to county council 402
See RATES.

LONDON—*Electric Lighting—Contract—Validity—Members of Corporation "directly or indirectly interested or concerned in" Contract—Municipal Corporation — City of London — City of London Sewers Act*, 1848 (11 & 12 *Vict. c. clxiii.*), *s.* 42.

Contracts for lighting the City of London, made between electric companies and the Commissioners of Sewers, are, like all contracts by companies with the Commissioners, upon the true construction of s. 42 of the City of London Sewers Act, 1848, null and void if at the date of the contracts any of the Commissioners, members of the Court of Aldermen or the Common Council, were shareholders in the lighting companies. But a valid contract is not made invalid by the mere fact that after the contract was made it was with the consent of the Commissioners transferred to another company in which Commissioners or members of the Court of Aldermen or of the Common Council were shareholders.

The decision of the Court of Appeal, [1901] 1 Ch. 602, affirmed. CITY OF LONDON ELECTRIC LIGHTING COMPANY *v.* LONDON CORPORATION H. L. (E.) 434

LORD'S DAY.
See under SUNDAY.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MINES—*Waterworks—Notice to prevent Working of Mines—Compensation—Arbitration — Rise in Value of Minerals — Evidence — Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 22–25 *—Lands Clauses Acts.*

Owners of coal mines under and near waterworks gave the undertakers notice under s. 22 of the Waterworks Clauses Act, 1847, that they intended to work the coal. The undertakers replied by a counter-notice requiring the mine owners not to work and stating their willingness to make compensation. In an arbitration under the Act and the Lands Clauses Acts to assess the compensation the mine owners gave evidence to prove that coal rose in value after the date of the counter-notice :—

Held, that there was no purchase of the coal or transfer of the property in the coal ; that the inquiry was not what was the value of the coal at the date of the counter-notice, but what would the coal owners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it ; and that the evidence was admissible.

The decision of the Court of Appeal, [1902] 2 K. B. 135, reversed, and the decision of Ridley and Phillimore JJ., [1901] 2 K. B. 798, restored. BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891), LIMITED *v.* PONTYPRIDD WATERWORKS COMPANY - - - - H. L. (E.) 426

—— Minerals—Repeal of prior Act—Reservation of vested rights - - - 289
See RAILWAY.

—— Railway — Reservation of minerals — Conveyance of surface—Costs - 22
See LANDS CLAUSES ACTS.

—— Superior and vassal—Casualty or composition—Annual value of minerals - 327
See SCOTTISH LAW.

MISTAKE—Money paid under mistake of fact—Marked cheque fraudulently altered—Negligence - - - - 49
See PRIVY COUNCIL APPEALS. 3.

MORTGAGE—*Redemption, Equity of — "Once a Mortgage always a Mortgage"—Clog on Redemption—Mortgage of Shares in Company—Stipulation that Mortgagee shall be employed as Broker by the Company.*

A holder of shares in a tea company mortgaged the shares to secure a loan and agreed to use his best endeavours to secure that "always thereafter" the mortgagee should have the sale of all the company's teas as broker, and in the event of any of the company's teas being sold otherwise than through the mortgagee to pay him the amount of the commission he would have earned if the teas had been sold through him. The mortgage was paid off and the company afterwards changed their broker. The quondam mortgagee having brought an action against the shareholder for breach of the above agreement :—

Held, by Lord Macnaghten, Davey, and

MORTGAGE—*continued.*

Robertson, Lords Shand and Lindley dissenting, that the case fell within the principle of *Browne* v. *Ryan*, [1901] 2 I. R. 653, approved by this House in *Noakes* v. *Rice*, [1902] A. C. 24, that the agreement was not binding, and that the action could not be maintained.

The decision of the Court of Appeal, [1901] 2 K. B. 550, reversed. BRADLEY *v.* CARRITT H. L. (E.) 253

2. —— *Registration of Deeds—Equitable Mortgage—Deposit of Title-deeds—Conveyance—Consideration—Antecedent Debt—Priority—Registry Act* (6 *Anne* (*Ir.*), *c.* 2), *ss.* 3, 5.

A customer of a bank in Ireland having overdrawn his account and being pressed by the bank undertook by letter to deposit a title-deed of an Irish estate as security for his overdraft. He deposited the title-deed with the bank, who did not register the charge. The customer afterwards mortgaged the estate to the appellants, who registered their charge without notice of the prior charge. Upon the question of the priority of the two incumbrances:—

Held, that the customer's letter amounted to an agreement to create an equitable charge upon the estate and ought to have been registered as a conveyance under 6 Anne (Ir.), c. 2; and that in default of registration it ranked after the mortgage to the appellants.

The decision of the Irish Court of Appeal, *In re Stevenson's Estate*, [1902] I. R. 23, reversed and the judgment of Meredith J. restored. FULLERTON *v.* PROVINCIAL BANK OF IRELAND H. L. (I.) 309

—— Building society—Mortgage by infant member invalid—Lien of building society
See BUILDING SOCIETY. 6

—— Restraint on alienation, Sale of property subject to—Mortgages by purchaser not a breach of condition - - 190
See PRIVY COUNCIL APPEALS. 17.

MUNICIPAL CORPORATION.
See under CORPORATION.

NATAL—Laws of - - - - 491
See PRIVY COUNCIL APPEALS. 19.

NATURALIZATION — Aliens and — Privileges conferred or withheld after naturalization - - - - - 151
See PRIVY COUNCIL APPEALS. 1.

NEGLIGENCE—Money paid under mistake of fact — Marked cheque fraudulently altered—Notice of dishonour - 49
See PRIVY COUNCIL APPEALS. 3.

NEW SOUTH WALES—Laws of.
See Cases under PRIVY COUNCIL APPEALS —NEW SOUTH WALES.

NEW ZEALAND—Laws of.
See Cases under PRIVY COUNCIL APPEALS —NEW ZEALAND.

NEWFOUNDLAND—Laws of - - 501
See PRIVY COUNCIL APPEALS. 20.

NOTICE—Dishonour — Money paid under mistake of fact—Marked cheque fraudulently altered—Negligence - 49
See PRIVY COUNCIL APPEALS. 3.

—— Waterworks—Notice to prevent working of mines—Compensation—Rise in value of minerals—Evidence - - 426
See MINES.

ONTARIO—Laws of.
See Cases under PRIVY COUNCIL APPEALS —CANADA.

PATENT—*Prolongation—Insufficiency of Accounts—Practice.*

The accounts presented to the Committee on an application for extension of a patent must be intelligible and complete, shewing what remuneration the patentee has actually received. He cannot be allowed, except perhaps in very special circumstances, to supplement them by oral evidence. *In re* WUTERICH'S PATENT P. C. 206

—— Alleged infringement—Coupler—New combination of known features—Appeal from Quebec - - - - 509
See PRIVY COUNCIL APPEALS. 14.

PATERNITY—Husband and wife, Statements by as to—Access or non-access before marriage - - - - - 395
See LEGITIMACY.

PAY—"Annual pay"—Pension — Special duty allowance - - - - 281
See POLICE.

PENALTY—Customs Act — Using ship stores, duty being unpaid—Penalty for breaking seals on ship goods—Appeal from Victoria - - - - 471
See PRIVY COUNCIL APPEALS. 28.

PENSION—Special duty allowance—"Annual pay" - - - - - 281
See POLICE.

PETITION OF RIGHT—Rent not to be deducted from salary where the officer is entitled to quarters - - - - 158
See PRIVY COUNCIL APPEALS. 27.

POLICE—*Pension — Special Duty Allowance — "Annual Pay"—Police Act*, 1890 (53 *&* 54 *Vict. c.* 45), *Sched. I., Rules* 1, 11.

By the Police Act, 1890, a constable who has completed a certain number of years' approved service is entitled to a pension which is to be "calculated according to the amount of his annual pay at the date of his retirement."

A constable at the date of his retirement was receiving 39*s.* a week, namely, 32*s.* being the ordinary pay of his rank and service, and 7*s.* in respect of special duty which he had performed for some years. He signed the weekly pay-lists in which the 32*s.* was entered in a column headed "Amount of Pay," and the 7*s.* in a column headed "Allowance for Special Duties":—

Held, that the 7*s.* a week formed no part of his "pay" for the purpose of calculating his pension.

By Lord Davey: It would have formed part of his "pay" if he had not by signing the weekly

POLICE—*continued.*
pay-sheets in that form contracted himself out of the right to claim it.
The decision of the Court of Appeal, [1901] 1 K. B. 384, affirmed. UPPERTON *v.* RIDLEY H. L. (E.) 281

POOR-RATES.
See under RATES.

POWER OF APPOINTMENT—*General Testamentary Power—Exercise—Covenant to exercise Power as Security for Loan—Liability of Appointed Fund for Debts—Priority.*
The donee of a general testamentary power of appointment over a fund borrowed money and as security covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund and that he would not revoke the will. He made a will accordingly and died:—
Held, that the lender was not entitled to priority as regards the fund over the appointor's general creditors; for personalty appointed by will under a general power is subject to the payment of the appointor's debts, as declared by Knight Bruce L.J. in *Fleming* v. *Buchanan*, (1853) 3 D. M. & G. 976, 980.
The decision of the Court of Appeal, *In re Lawley, Zaiser* v. *Lawley*, [1902] 2 Ch. 799, affirmed. BEYFUS *v.* LAWLEY - H. L. (E.) 411

2. —— *Special Power—Exercise by Will—Change of Investment—Ademption—Premiums—"Capital Money"—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 23, 24, 27—*Settled Land Acts*, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5, *and* 1884 (47 & 48 *Vict. c.* 18), *s.* 4.
A tenant for life of real estate who had under the settlement power to appoint the estate by will among his children after his own death exercised the power and appointed the estate among his children. Afterwards the testator granted under the Settled Land Act, 1882, leases of parts of the appointed property in consideration of premiums paid by the lessees. The premiums were paid to the trustees of the settlement and invested by them:—
Held, that there being in the will no apparent intention to appoint the property representing the premiums, that property did not pass under the appointment.
The decision of the Court of Appeal in *In re Moses, Beddington* v. *Beddington*, [1902] 1 Ch. 100, affirmed.
The decision of Farwell J. in *In re Dowsett*, [1901] 1 Ch. 398, approved. BEDDINGTON *v.* BAUMANN - - - - H. L. (E.) 13

—— Duty, Liability to—Residuary estate taken under appointment empowered by the will - - - - - 350
See PRIVY COUNCIL APPEALS. 25.

POWER OF ATTORNEY—Forged power—Liability of agent - - - 114
See PRINCIPAL AND AGENT.

POWERS—Appointment.
See under POWER OF APPOINTMENT.

—— Attorney, Power of.
See under POWER OF ATTORNEY.

POWERS—*continued.*
—— Local legislature—Ontario Act to prevent the profanation of the Lord's Day ultra vires - - - - - 524
See PRIVY COUNCIL APPEALS. 7.

PRACTICE—*Appeal against Costs—Competency of Appeal.*
The House of Lords will not entertain an appeal against costs only.
Appeal against a judgment of the First Division of the Court of Session, Scotland, (1902) 40 S. L. R. 50, dismissed. CALEDONIAN RAILWAY COMPANY *v.* BARRIE - - H. L. (Sc.) 126

—— Appeal — Costs — Terms of special leave allowing respondent to cross-appeal without petition - - - 208
See PRIVY COUNCIL APPEALS. 22.

—— Appeal — Special leave — Appeal from Canada - - - - 521
See PRIVY COUNCIL APPEALS. 8.

—— Appeal in formâ pauperis, Petition for leave to—Application must be first made to Court below - - - 170
See PRIVY COUNCIL APPEALS. 21.

—— Joinder of assignor in action—Contract to supply goods to company—Assignability
See CONTRACT. 414

—— Parties—Restricted power of liquidators of bank to sue in their own names - 220
See PRIVY COUNCIL APPEALS. 10.

—— Patent — Prolongation — Insufficiency of accounts - - - - 206
See PATENT.

—— Questions referred, Practice as to—Appeal from Ontario - - - 524
See PRIVY COUNCIL APPEALS. 7.

PREMIUMS—Settled land—"Capital money"—Change of investment—Ademption 13
See POWER OF APPOINTMENT. 2.

PRESCRIPTION—Way—Inference from facts—Payment for user - - - 229
See WAY, RIGHT OF.

PRINCIPAL AND AGENT—*Bank of England—Transfer of Stock—Power of Attorney—Implied Warranty of Authority—Innocent Misrepresentation—Forged Power—Liability of Agent.*
The principle of *Collen* v. *Wright*, (1857) 8 E. & B. 647, 657, is not confined to cases where the transaction with the person representing himself to be an agent results in a contract.
A broker applied to the Bank of England for a power of attorney for the sale of Consols believing himself to be instructed by the stockholder, and bonâ fide induced the bank to transfer the Consols to a purchaser upon a power of attorney to which the stockholder's signature was forged:—
Held, that the broker must be taken to have given an implied warranty that he had authority, and that he was therefore liable to indemnify the bank against the claim of the stockholder for restitution.
Decisions of Kekewich J., [1901] 1 Ch. 652, and the Court of Appeal, reported as *Oliver* v. *Bank of England*, [1902] 1 Ch. 610, affirmed. STARKEY *v.* BANK OF ENGLAND - H. L. (E.) 114

PRIORITY—Covenant to exercise power as security for loan—Liability of appointed fund for debts - - - 411
See POWER OF APPOINTMENT. 1.

—— Registration of deeds—Equitable mortgage—Conveyance - - - 309
See MORTGAGE. 2.

PRIVY COUNCIL APPEALS—BRITISH COLUMBIA—*British North America Act, s. 91, sub-s. 25; s. 92, sub-s. 1—Naturalization and Aliens—British Columbia Provincial Elections Act, s. 8—Powers of Provincial Legislature—Privileges conferred or withheld after Naturalization.*

Sect. 91, sub-s. 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted.

The provincial legislature has the right to determine, under s. 92, sub-s. 1, what privileges, as distinguished from necessary consequences, shall be attached to it.

Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not ultra vires. CUNNINGHAM AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* TOMEY HOMMA AND ATTORNEY-GENERAL FOR DOMINION OF CANADA - P. C. 151

2. —— **CANADA** — *Arbitration — Award — Jurisdiction of Arbitrators—Deed of Submission—Construction.*

By agreement of submission dated April 10, 1893, the provinces of Ontario and Quebec referred to a statutory tribunal the "ascertainment and determination of the amount of the principal of the Common School Fund and the method of computing" interest thereon, and of the amount for which Ontario was liable. That fund was established by Canadian Act (12 Vict. c. 200), and consisted (inter alia) of the proceeds of public lands received by Ontario and paid to the Dominion:—

Held, that a claim by Quebec that Ontario should be debited with uncollected prices of land sold by it, being a claim for wilful neglect and default and in the nature of damages, not suggested in but heterogeneous to the matters actually specified in the submission, was not on its true construction included therein. ATTORNEY-GENERAL FOR ONTARIO *v.* ATTORNEY-GENERAL FOR QUEBEC - - - - P. C. 39

3. —— *Bank—Money paid under Mistake of Fact — Marked Cheque fraudulently altered — Negligence — Notice of Dishonour — Reasonable Delay.*

A cheque for $5 certified by the respondent bank's stamp was fraudulently altered to $500 and paid by the respondent to the appellant, a holder for value, under a mistake of fact, which was not discovered till the next day.

In an action by the respondent to recover back $495 from the appellant:—

Held, (1.) that the respondent was at liberty to prove, as between itself and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified.

Scholfield v. *Earl of Londesborough*, [1896] A. C. 514, followed.

PRIVY COUNCIL APPEALS—CANADA—*contd.*

(2.) No negligence was imputable to the respondent in cashing the cheque without examining the drawer's account; and even if it were, it did not induce the appellant to treat the cheque as good.

Kelly v. *Solari*, (1841) 9 M. & W. 54, approved.

(3.) Notice of forgery was unnecessary, and the cheque for $5 was not dishonoured; and, accordingly, the stringent rule laid down in *Cocks* v. *Masterman*, (1829) 9 B. & C. 902; 33 R. R. 365, to the effect that notice of dishonour of a bill of exchange must be given on the due date, does not apply. The rule will not be extended to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by delay. IMPERIAL BANK OF CANADA *v.* BANK OF HAMILTON - P. C. 49

4. —— *Revenue — Canadian Customs Tariff Act*, 1897, *s.* 4 — *Duty on Imported Goods—Foreign-built Ship.*

A foreign-built ship bought in the United States and brought to Canada is liable to the duty imposed by the Canadian Customs Tariff Act, 1897, s. 4, Sched. A, item 409. ALGOMA CENTRAL RAILWAL COMPANY *v.* THE KING P. C. 478

5. —— *Ontario — Copyright—Imperial Fine Arts Copyright Act*, 1862—*Canada Copyright Act*, 1875—*Copyright within the United Kingdom.*

The Imperial Fine Arts Copyright Act, 1862, confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs. It extends to the whole of the United Kingdom, but does not extend to any part of the British dominions outside the United Kingdom.

Tuck & Sons v. *Priester*, (1887) 19 Q. B. D. 629, approved.

There is nothing in the Canada Copyright Act, 1875, or in the International Copyright Acts, which conflicts with this view. HENRY GRAVES & Co., LIMITED *v.* GORRIE - P. C. 496

6. ——*Ontario—Lands in Ontario surrendered by the Indians — Proprietary Right—Power of Disposition — British North America Act*, 1867, *s.* 91.

Lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the Ministers of the province and under the seal of the province.

St. Catherine's Milling Co. v. *Reg.*, (1888) 14 App. Cas. 46, followed.

The Dominion Government having purported, without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty:—

Held, that this was ultra vires the Dominion, which had by s. 91 of the British North America Act of 1867 exclusive legislative authority over the lands in question, but had no proprietary rights therein.

The consent of the province having been

subsequently provided for by a statutory agreement between the two Governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had been mode. ONTARIO MINING COMPANY *v.* SEYBOLD **P. C. 73**

7. —— *Ontario—Powers of Local Legislature —Ontario Act*, 1897, *c.* 246, *to prevent the Profanation of the Lord's Day ultra vires—Exclusive Power of the Dominion Parliament over Criminal Legislation—British North America Act*, 1867, *s.* 91, *sub-s.* 27 — *Practice as to Questions referred.*

Held, that "An Act to prevent the Profanation of the Lord's Day" (Revised Statutes of Ontario, 1897, c. 246) treated as a whole is ultra vires of the Ontario Legislature.

The criminal law in its widest sense is reserved by s. 91, sub-s. 27, of the British North America Act, 1867, for the exclusive authority of the Dominion Parliament; and an infraction of the above Act is an offence against criminal law.

It is not the practice of their Lordships to give speculative opinions on hypothetical questions submitted. The questions must arise in concrete cases and involve private rights. ATTORNEY-GENERAL FOR ONTARIO *v.* HAMILTON STREET RAILWAY COMPANY - - **P. C. 524**

8. —— *Ontario — Practice—Appeal—Special Leave—Revised Statutes of Canada*, 1886, *c.* 135, *s.* 71.

According to s. 71 of Revised Statutes of Canada, 1886, c. 135, there is no appeal from any judgment or order of the Supreme Court of Canada except by special leave of His Majesty in Council.

Where a suitor, having his choice whether to appeal to the Supreme Court or to His Majesty in Council, elects the former remedy, it is not the practice to give him special leave except in a very strong case.

Prince v. *Gagnon*, (1882) 8 App. Cas. 103, followed. CLERGUE *v.* MURRAY. *Ex parte* CLERGUE - - - - **P. C. 521**

9. —— *Quebec—Action, Cause of—Insolvency of Debtor—Civil Code of Lower Canada, art.* 1092.

Under art. 1092 of the Civil Code of Lower Canada an action to recover the balance of purchase-money of land may be brought although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security. KENSINGTON LAND COMPANY *v.* CANADA INDUSTRIAL COMPANY **P. C. 213**

10. —— *Quebec — Company — Liquidator — Canadian Winding-up Act*, 1886, *ss.* 15 *and* 31—*Restricted Power of Liquidators of Bank to sue in their own Names—Civil Procedure Code, ss.* 516 *and* 421—*Power to amend by adding Bank as Plaintiffs.*

Under the Canadian Winding-up Act, 1886, ss. 15 and 31, a company in liquidation retains its corporate powers including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name or in that of the company, according to the nature of the action: in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debts or its property.

Where liquidators sued in their own name to recover a debt due to the company:—

Held, that the error was one of form, which the Court had power to give leave to amend under ss. 516 and 521 of the Code of Civil Procedure. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion. KENT *v.* LA COMMUNAUTÉ DES SŒURS DE CHARITÉ DE LA PROVIDENCE - **P. C. 220**

11. —— *Quebec — Contract — Construction — Duty of clearing Track of Ice and Snow—Right to clear Ice and Snow into the Streets—Electric Sweeper.*

The city council of Montreal being bound as the road authority to remove the ice and snow on the streets from curb to curb, including the snow thrown or falling thereon from the roofs of houses and removed thereto from the side walks:—

Held, that the respondent street railway company, having contracted with the city to keep their track free from ice and snow, did not, having regard to the surrounding circumstances, and in the absence of words expressly or impliedly forbidding it, commit a nuisance by sweeping their snow into the street.

Ogston v. *Aberdeen District Tramways Co.*, [1897] A. C. 111, distinguished.

Held, also, that the city having granted to the company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets in the manner successfully in use elsewhere, the latter could not be prevented from using the electric sweepers. CITY OF MONTREAL *v.* MONTREAL STREET RAILWAY COMPANY - - - - **P. C. 482**

12. —— *Quebec — Damages — Law of Lower Canada—Action négatoire against Proprietor—Liability of Lessee to adjoining Proprietor in respect of Works on his Land.*

Where a lessee of defendants' land, being in possession thereof and having a contract for future purchase contained in his lease, raised for the purpose of building operations for his own benefit, and not as mandatory of the defendants, the lower part of the leased land with the effect of diverting to the plaintiff's adjoining land, and thereby causing him damage, the water which would otherwise have been discharged over the defendants' land:—

Held, that the plaintiff's remedy was against the lessee, and that an action négatoire against the defendants, who claimed no servitude over the plaintiff's land, was unnecessary. KIEFFER *v.* LE SÉMINAIRE DE QUÉBEC - - **P. C. 85**

13. —— *Quebec — Debts — Signification to Debtor of Transfer of Debt—"Third Person"—Law of Lower Canada—Civil Code, arts.* 1570 *and* 1571 *—Construction.*

Under arts. 1570 and 1571 of the Civil Code of Lower Canada, signification to the debtor of

PRIVY COUNCIL APPEALS—CANADA— *contd.*
the act of sale of his debt need not be by a notarial act.

Quære, whether the debtor is a "third person" within the meaning of the latter section against whom signification is necessary in order to perfect possession.

Murphy v. *Bury*, (1895) 24 Can. S. C. 668, doubted.

The institution of an action against the debtor is itself a sufficient signification of the transfer of the debt. BANK OF TORONTO *v.* ST. LAWRENCE FIRE INSURANCE COMPANY - - P. C. 59

14. —— *Quebec — Patent — Alleged Infringement—Coupler with Steam-tight Fasteners and Automatic Separator—New Combination of Known Features.*

In an action for infringement of a patent, if the merit of the invention consists in the idea or principle which is embodied in it, and not merely in the means by which that idea or principle is carried into effect, the patentee must shew that the idea or principle is new; and must fail if the merit of his invention lies merely in a new combination of known features.

Where the appellants, patentees for improvements in hose-coupling, had produced a coupler of pipes or hose attached to two railway cars, so as to secure a steam-tight fastening which would permit an automatic separation of the two ends when the cars were uncoupled; while the respondent's coupler was in all material respects the same as the appellants' and produced the same result, but omitted the use of one particular feature called a "rib" or hinge-joint, which was proved to have been a very material element in the success of the appellants' coupler, their specification shewing that they never contemplated its omission or that their invention could be operated without it:—

Held, that there had been no infringement, for the respondent's coupler was shewn to have been a different and a new way of achieving the end contemplated by the appellants' coupler. CONSOLIDATED CAR HEATING COMPANY *v.* CAME P. C. 509

15. —— *Quebec — Succession Duty (Quebec) Act*, 1892—*Construction—Quebec Taxes apply to Quebec Successions.*

Held, that taxes imposed on movable property by the Quebec Succession Duty Act of 1892 and the amending Acts apply only to property which the successor claims under or by virtue of Quebec law; and have no application to the several items in this case, which formed part of a succession devolving under the law of Ontario. LAMBE *v.* MANUEL - - - - P. C. 68

16. —— **CAPE OF GOOD HOPE**—*Lands for Railway Purposes, Claim to take—Compensation —Cape of Good Hope Act IX. of* 1858, *s.* 11—*Construction.*

It is a sound canon of construction that an intention to take away property without compensation should not be imputed to a legislature unless it be expressed in unequivocal terms.

Western Counties Ry. Co. v. *Windsor and Annapolis Ry. Co.*, (1882) 7 App. Cas. 178, followed.

PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE—*continued.*

Where it appeared that road commissioners claimed to expropriate without compensation the respondent's land for railway purposes on the ground that s. 11 of Act IX. of 1858 effected a transfer to them of the rights derived by the Government from the proclamation of 1813, and extended those rights so as to be applicable to the present case:—

Held, that s. 11 must receive a strict construction. Its language was satisfied by the transfer of the existing powers without any extension thereof. It would require a more direct expression of intention to create such a new power of expropriation for railway purposes without compensation as was claimed. COMMISSIONER OF PUBLIC WORKS (CAPE COLONY) *v.* LOGAN - - - - - P. C. 355

17. —— *Roman-Dutch Law—Fidei Commissum Conditionale—Sale of Property subject to Restraint on Alienation—Construction—Mortgages by Purchaser not a Breach of Condition.*

Where husband and wife (married in community) by a duly executed deed in 1881 transferred immovable property to their son for valuable consideration, stipulating that "it shall never be sold or parted with in favour of a stranger, but shall permanently remain among legal heirs," and on the death of the surviving parent his executor executed in 1890 before the registrar of deeds a deed of conveyance to the son, who thereupon mortgaged with notice the property to strangers:—

Held, that the effect of the deed of 1881 followed by the deed of 1890 was to vest the property in the son, subject to a prohibition against alienation to any person not a member of the family:

Held, further, in a suit against the mortgagees brought on behalf of some of the son's heirs in respect of their shares in his inheritance, that, although the prohibition created a fidei commissum conditionale, i.e., a fidei commissum conditioned to come into existence on a breach of the prohibition, yet mortgages by the son, not being absolute alienations, did not constitute a breach of the prohibition until enforced by a judicial sale. JOSEF *v.* MULDER - P. C. 190

18. —— **CEYLON**—*Arbitration—Reference by the Court of a pending Action—Ex parte hearing by Arbitrator—Validity of Award—Ordinance* 2 *of* 1889 (*C. C. P.*), *ss.* 676, 677, 685, 691.

Where the subject of an arbitration is an action in Court, ss. 676, 677, 685, and 691 of the Civil Procedure Code are applicable. Thereunder the parties state in writing the matter to be referred, the Court refers to an arbitrator agreed on the matter in difference, the award is filed in Court and receives the effect of a judicial decree, and can only be set aside for corruption and misconduct of the arbitrator:—

Held, that the respondent was not entitled at his own option to withdraw from such a reference, and if he did so it was not misconduct in the arbitrator to proceed therein to award. AITKEN, SPENCE & CO. *v.* FERNANDO P. C. 200

19. —— **NATAL** — *Will — Vested Interest —*

PRIVY COUNCIL APPEALS—NATAL—*contd.*

Contingency of either Son dying before his Brother —Clause of Substitution—Construction of Will.

The testator, after dividing equally his residuary estate between his two sons, directed that "in the event of either of my two sons dying before his brother without legitimate issue, then his share shall become the property of his surviving brother; but if there are any legitimate children surviving their father, then" for their benefit as directed:—

Held, that the bequest created a vested interest in the sons, but one liable to be divested as to the son first dying (whether before or after the testator's death) in favour of the objects named in the clause of substitution. DUFFILL *v.* DUFFILL - - - - - - P. C. 491

20. —— **NEWFOUNDLAND**—*Shipping—Salvage Services—Ship Salved the Property of the Crown—Action not maintainable.*

Where a ship is the property of the Crown, no action in rem or otherwise for salvage can be maintained. The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by statute. YOUNG, MASTER OF SS. "FURNESIA" *v.* SS. "SCOTIA" - - - - P. C. 501

21. —— **NEW SOUTH WALES**—*Appeal in Formâ Pauperis, Petition for Leave to—Application must be first made to Court below—Practice.*

It is a rule of general if not universal application that the Judicial Committee will not entertain a petition for leave to prosecute an appeal in formâ pauperis where the Court below has power to grant leave on the usual conditions, unless in the first instance an application for leave to appeal has been made within due time to the Court from which it is proposed that the appeal should be brought. WALKER *v.* WALKER. *Ex parte* WALKER - - - P. C. 170

22. —— *Civil Servant—Additional Years of Service need not be continuous—Terms of Special Leave allowing Respondent to cross-appeal without Petition—Costs—New South Wales Civil Service Act*, 1884, *s.* 48—*Construction.*

Where an officer within the meaning of the New South Wales Civil Service Act, 1884, held office as a civil servant from 1857 to 1861, then was employed by the Government from 1861 to 1880 as a licensed surveyor but not as an officer as aforesaid, then as an officer from 1880 to 1896, when he was superannuated:—

Held, that the years of service from 1857 to 1861 were additional years within the meaning of s. 48, entitling him to a superannuation allowance in respect thereof. There was nothing in the Act to shew that the service in respect of which allowance was provided must be continuous.

Special leave granted on special terms as to costs, reserving to respondent a right to cross-appeal without petition to that effect. WALKER *v.* SIMPSON - - - - P. C. 208

23. —— *Lands — Non-renewal of Licences gazetted by Mistake—Power of the Minister to reverse the same—Effect of the Reversal—New South Wales Crown Lands Act*, 1889, *s.* 33; *of* 1891, *s.* 3.

The lands in suit had been reappraised in 1899, but the reappraisement was not finally settled till January 19, 1900, and accordingly the fees in respect of the appellant's licences for 1900 had not been paid before the expiration of 1899. By error his lands had been gazetted in September, 1899, as requiring payment of fees at the old rates, and on January 6, 1900, non-renewal of the licences had also been gazetted. The appellant thereupon paid the fees at the old rates on account, and obtained a reversal of the non-renewal.

Thereafter the respondent applied for and obtained annual leases of the same lands; but, *held*, that they were still under licence to the appellant, and therefore not available for lease under s. 33 of the Land Act of 1889.

There had not been under the circumstances default by the appellant, and consequently there was no authority to refuse renewal of his licences. The notice purporting to that effect was a mistake which it was in the power and duty of the Minister to rectify.

Semble, under s. 3 of the Land Act of 1891 the Minister's reversal of the non-renewal had the same effect as if the non-renewal had never been notified or declared. O'KEEFE *v.* MALONE P. C. 365

24. —— **NEW ZEALAND**—*Charitable Trust, Administration of—The Crown cannot as Defendant impeach the Trust—Construction of Grant—Valid Gift for Charitable Purposes—Failure of Specified Purpose—Cy-près.*

It is contrary to the established practice of the Court to permit a defendant to an action for the administration of the trusts of a settlement not void on the face of it to impeach the settlement in his defence to that action.

Where the Crown, as party defendant to a suit for the administration of a charitable trust, obtained from the Court below an order that the trust was void and that the land and money in suit had become its property:—

Held, that the suit was not one in which the order could properly be made.

Where it appeared that certain Maori chiefs had in 1848 ceded 500 acres of land, part of the native reserves, with the consent of the Crown, which waived its right of pre-emption thereof, to the Bishop of New Zealand in trust for a college to be erected thereon for the general purpose of promoting religion, and no college had been erected, the land having in course of time become an unsuitable site, while the accumulations of its rent had amounted to a considerable sum:—

Held, that there had been an express gift of land and money for charitable purposes; that such a gift is not invalidated by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all; and that the doctrine of cy près was applicable. WALLIS *v.* SOLICITOR-GENERAL FOR NEW ZEALAND - - P.C. 173

25. —— *Revenue—Estate Duty—Liability to Duty—Residuary Estate taken under Appointment empowered by the Will—New Zealand Deceased*

PRIVY COUNCIL APPEALS—NEW ZEALAND —*continued.*

Persons' Estates Duties Acts of 1881, *s.* 36; *of* 1885, *s.* 18.

Held, that, under New Zealand Deceased Persons Estates Duties Acts of 1881, s. 36, and the amending Act of 1885, s. 18, a widow who takes her husband's estate by her own appointment under his will takes an estate upon which the duty payable under the Act is a charge imposed as from the date of the death, and cannot claim the exemption to which she would have been entitled had she acquired the estate directly under the will. JACKSON *v.* COMMISSIONER OF STAMPS - - - **P. C. 350**

26. —— TASMANIA—*Will—Issue—Gift over —Construction.*

In a gift over on failure of the line of one child to "other of my children and their issue," the word issue must receive its plain and ordinary meaning, and not be restricted to the issue of children dying in the lifetime of the testatrix unless the rest of the will plainly requires it. The gift over in this case was subject to the condition that those only took under it who were also beneficiaries under the original gift, in which original gift issue was restricted as above by the immediate context:—

Held, that that was insufficient by itself to control the meaning of the word used in a new connection. Accordingly the appellants were entitled to share in the said gift over as issue of a child other than the child whose line had failed; and this notwithstanding that under the original gift they had taken in substitution for their mother. EDYVEAN *v.* ARCHER. *In re* HARRIETT BROOKE, DECEASED - **P. C. 379**

27. —— VICTORIA — *Petition of right — Victoria Act No.* 773 *in* 1883, *s.* 89—*Construction —Rent not to be deducted from Salary where the Officer is entitled to Quarters.*

Under s. 89 of Act No. 773 in 1883, re-enacted by s. 136 of Act No. 1133 in 1890, the power of the Government to make a deduction from an officer's salary for rent only exists where he has no right or title to quarters.

Where the appellant as postmaster of Geelong was compelled to reside upon Government premises for the performance of his duties there:—

Held, that the Government was not entitled to deduct 72*l.* for rent from his salary of 540*l.*, and it made no difference that the Appropriation Acts annually provided only 468*l.* to meet it.

So *held* also where the officer was governor of a gaol bound to reside in the quarters assigned, and the deduction of 70*l.* rent from his fixed salary of 570*l.*, on which his statutory pension was calculated, was carried out by an Order in Council fixing his salary at 500*l.* and silent about deductions. THE KING *v.* FISHER. THE KING *v.* BULL - - - - **P. C. 158**

28. —— *Revenue—Australian Customs Act,* 1901, *ss.* 127, 192 — *Construction — Using Ship Stores, Duty being unpaid—Sect.* 192 *intra vires —Penalty for Breaking Seals on Ship Goods.*

Under s. 127 of the Customs Act, 1901, of the Commonwealth of Australia, a penalty is incurred for using ship stores while the ship is A. C. 1903.

PRIVY COUNCIL APPEALS—VICTORIA—*contd.* within the territorial waters or in the port of Melbourne, unless the duty thereon has been paid.

Under s. 192 a penalty is incurred for the act of breaking the seals, whether on the high seas or elsewhere, which had been lawfully imposed on ship goods in lieu of exacting payment of duties and entering an Australian port with the seals broken; and the section is not ultra vires the Australian Commonwealth in respect of the seals being broken outside its jurisdiction. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* KINGSTON - - **P. C. 471**

PROLONGATION — Patent — Insufficiency of accounts—Practice - - **206**
See PATENT.

QUEBEC—Laws of.
See Cases under PRIVY COUNCIL APPEALS —CANADA.

RAILWAY—*Minerals—Repeal of prior Act— Reservation of Vested Rights — Arbitration and Award Ultra Vires—Costs of Arbitration—Lands Clauses Consolidation Act,* 1845 (8 *&* 9 *Vict. c.* 18), *s.* 34.

Land was bought by a railway company in 1839, the conveyance being expressed to be in accordance with a special Act by which minerals were to be deemed to be excepted out of the purchase and the mining rights were defined. A special Act of 1846 repealed the prior Act with a proviso that the repeal should not affect any conveyance, contract, or thing executed, made or done under the repealed Act. The Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, were incorporated in the Act of 1846. The owner of minerals under the land gave the company notice of his intention to work the minerals, and claiming that the mining rights were regulated by the Railways Clauses Act, 1845, required an arbitration under the Lands Clauses Act, 1845. The company attended the arbitration under protest, and the umpire made an award giving the owner of the minerals purchase-money and compensation under the Railways Clauses Act, 1845. The owner having sued the company on the award to recover the sum awarded and the costs of the arbitration:—

Held, that the effect of the proviso in the Act of 1846 was that the mining rights were regulated by the repealed Act and not by the Railways Clauses Act, 1845; that the arbitration and award were ultra vires, and that the owner of the minerals was not entitled to the sum awarded or to the costs of the arbitration.

The reasoning of the Court of Appeal on the above points, [1899] 1 Q. B. 921, disapproved, for the reasons there given by Collins L.J. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* WALKER - - - **H. L. (E.) 289**

—— Claim to take lands for railway purposes— Compensation—Cape of Good Hope Act
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—— Minerals, Reservation of — Conveyance of surface—Costs - - - **22**
See LANDS CLAUSES ACTS.

RATES—*Poor-rate Collector (Ireland)—Transfer of Existing Officers to County Council—Scheme for Collection of Poor-rate—Remuneration—Local Government (Ireland) Act*, 1898, *c.* 37, *s.* 115, *subss.* 10–16, 18.

Sub-s. 18 of s. 115 of the Local Government (Ireland) Act, 1898, does not apply to poor-rate collectors transferred to a county council, at any rate so far as the fixing the amount of their remuneration is concerned. Provision for their remuneration is made by sub-s. 11 :—

So *held* by the Earl of Halsbury L.C. and Lords Macnaghten, Davey, and Robertson, Lord Lindley dissenting.

The decision of the Court of Appeal (Ireland), [1902] 2 I. R. 637, reversed, and the order for the mandamus discharged. Local Government Board for Ireland *v.* The King **H. L. (I.) 402**

REDEMPTION—Clog on, Stipulation that mortgagee shall be employed as broker by
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REMUNERATION—Poor-rate collector (Ireland)—Transfer of existing officers to county council - - - - **402**
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RENT—Petition of right—Rent not to be deducted from salary where the officer is entitled to quarters - - - - **158**
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'RESIDUARY DEVISE"—Specific devise **1**
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RESTRAINT ON ALIENATION—Sale of property subject to—Fidei commissum conditionale - - - - **190**
See Privy Council Appeals. 17.

REVENUE—*Income Tax—Annuity—Purchase-money—Payment by Annual Instalments with Interest—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *and* 1853 (16 & 17 *Vict. c.* 34), *Scheds. C and D.*

The Secretary of State for India had power by contract to purchase a railway, paying for the purchase the full value of all the shares or capital stock of the railway company, with the option of paying instead of a gross sum "an annuity" for a term of years, the rate of interest to be used in calculating the annuity being determined in a specified way. The Secretary of State purchased the railway and exercised the option to pay an annuity instead of a gross sum. The annuity was paid half-yearly, each payment representing, as to part, an instalment of the purchase-money, and as to the rest, interest on the amount of the purchase-money unpaid :—

Held, that the Income Tax Acts do not tax

REVENUE—*continued.*

capital as income, and that income tax was not payable upon that part of the annuity which represented capital.

The decision of the Court of Appeal, [1903] 1 K. B. 494, affirmed. Secretary of State in Council of India *v.* Scoble - **H. L. (E.) 299**

2. —— *Income Tax—Interest from Colonial Investments—Remittances not identified as Capital—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Case* 4.

By s. 100 of the Income Tax Act of 1842 it is provided that the duty chargeable under Sched. D, case 4, in respect of interest from "securities" in the Colonies, &c., is to be computed on the sums which have been, or will be, received in Great Britain in the current year.

A mutual life assurance society with its head office in Edinburgh, and where its management was exclusively vested in directors, sent to Australia for investment down to the end of 1898 a total sum of 1,504,000*l.* The total remittances made to this country to the same date was 716,500*l.*, while the total funds in Australia, including accumulated interest and deducting all Australian expenses to the same date, was 1,822,207*l.* The funds still remaining in Australia thus exceeded by 318,207*l.* the sums sent there for investment. The amount remitted to this country from Australia in 1898 was 217,350*l.* All this except 5000*l.* was intermixed with the society's funds in Australia, and the society did not shew in their statement that the balance of 212,350*l.* was in fact capital sent home :—

Held, affirming the decision of the First Division of the Court of Session, (1901) 3 F. 874, that the Income Tax Commissioners had rightly charged the 212,350*l.* with income tax. Scottish Provident Institution *v.* Allan **H. L. (Sc.) 129**

—— Customs Act—Using ship stores, Duty being unpaid—Penalty for breaking seals on ship goods—Appeal from Victoria **471**
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ROMAN-DUTCH LAW—Fidei commissum conditionale—Restraint on alienation **190**
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SALARY—Petition of right—Rent not to be deducted from salary where the officer is entitled to quarters - - **158**
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SALVAGE—Ship salved the property of the Crown—Action not maintainable—Appeal from Newfoundland - **501**
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SCOTTISH LAW—*Superior and Vassal—Casualty or Composition — Singular Successor — Annual Value of Minerals.*

The measure of the right of a superior to a casualty or composition on the entry of a singular successor is the year's rent for which the land is let for the time, and this rent includes mineral rents or royalties where coal or other minerals are being worked; and it makes no difference that the minerals are approaching exhaustion.

Duke of Hamilton v. *Allan's Trustees*, (1878) 5 R. 510, approved.

Appeal from the decision of the Court of Session, Scotland, (1900) 2 F. 1218. EARL OF HOME *v.* LORD BELHAVEN AND STENTON H. L. (Sc.) 327

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—— Railway—Reservation of minerals—Conveyance of surface—Costs - - 22
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SHIPPING — *Charterparty — Demurrage — Discharge of Cargo—"As fast as the Steamer can deliver"—Reasonable Despatch under the Circumstances—Liability for Delay.*

A clause in a charterparty providing that the cargo is to be discharged with customary steamship despatch as fast as the steamer can deliver during the ordinary working hours of the port of discharge, but according to the custom of the port, is not tantamount to fixing a definite number of days or hours during which the discharge is to be completed. To create such a liability the days or hours must be specified in plain terms. This construction of the clause is not affected by a special exception in the case of a strike, a lockout or epidemics. Demurrage is not due if the discharge is effected with the utmost despatch practicable, having regard to the custom of the port, the facilities for delivery, and all other circumstances not brought about by or within the control of the person whose duty it is to take delivery.

SHIPPING—*continued.*

The decision of the Court of Appeal, [1902] 2 K. B. 199, affirmed. HULTHEN *v.* STEWART & Co. - - - - H. L. (E.) 389

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Under s. 28 of the Tramways Act, 1870, a tramway company is bound to keep that part of

TRAMWAY—*continued.*
the highway which lies between the rails in a fit and safe condition for the passing traffic to the satisfaction of the road authority; and failure to perform this duty renders the tramway company liable in damages to a person injured thereby. DUBLIN UNITED TRAMWAYS COMPANY *v.* FITZGERALD - - - H. L. (I.) 99

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WAY, RIGHT OF—*Prescription—Inference from Facts—Payment for User—Enjoyment as of Right —Lost Grant—Easement—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2.

For more than forty years without interruption the owner of a house used a cart way from his stables through the yard of an adjoining inn to the public road, paying each year 15*s.* to the owners of the inn yard. There was no agreement in writing, and no conclusive evidence as to the origin of or the consideration for the payment:—

Held, that the inference of fact this House drew from the evidence was that the payment was made for leave to use the way; that there had therefore been no enjoyment of right within the Prescription Act, 1832, s. 2; and that there was no ground for presuming a lost grant.

The decision of the Court of Appeal, [1901] 2 Ch. 198, affirmed. GARDNER *v.* HODGSON'S KINGSTON BREWERY COMPANY - H. L. (E.) 229

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See under HUSBAND AND WIFE.

WILL—"*Residuary Devise*"—*Specific Devise—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 25.

A devise which does not include all the testator's real estate may be a good "residuary devise" within the meaning of the Wills Act, 1837, s. 25.

The decision of the Court of Appeal, [1901] 1 Ch. 619, affirmed. MASON *v.* OGDEN
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2. —— *Shelley's Case, Rule in*—"*Issue*"—*Estate in Special Tail—Will—Construction.*

A devise to "Charles if he marries a fit and worthy gentlewoman and his issue male to such issue male and their male descendants in failure of which" then over:—

Held, upon the true construction of this will to be equivalent to a devise to "Charles and such issue male as he may have by marriage with a fit and worthy gentlewoman and their male descendants, in failure of which" then over, and thus to create an estate in special tail male in Charles.

The decisions of Buckley J. and the Court of Appeal, [1902] 1 Ch. 34, affirmed for the reasons given by Buckley J. and Romer L.J. PELHAM CLINTON *v.* DUKE OF NEWCASTLE H. L. (E.) 111

3. —— *Survivor* — "*Then surviving*" — *Construction of Will.*

A will gave portions in trust for each of the testator's children, E., L., and T., for their respective lives, and afterwards for their respective children; provided that if any of his children died without leaving a child entitled to take under the will, the shares of such children should go to their "then surviving" brothers and sisters, if more than one in equal shares, and if only one then to him or her absolutely.

E., L., and T. all survived the testator. E. died first, leaving children. Then L. died without issue, leaving T. surviving:—

Held, that upon the true construction of this will the words "then surviving" must receive their ordinary and natural meaning, and that the children of E. took no part of L.'s share.

The decision of the Court of Appeal, [1901] 2 Ch. 738, affirmed. INDERWICK *v.* TATCHELL
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